Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

LYNN HUST,

Petitioner,

v.

FRANK MARVIN PHILLIPS, JR.,

Respondent.

PETITION FOR WRIT OF CERTIORARI

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTIONS PRESENTED

1. Did a prison librarian violate a prisoner's right of access to courts when she declined to let the prisoner use the library's comb-binding machine to bind a petition for writ of certiorari, even though comb-binding is not required by this Court's rules and is, in at least some circumstances, affirmatively discouraged?

2. Was the law imposing liability in this specific context so clearly established that a reasonable librarian would know that denying a prisoner's request to comb-bind his petition was unlawful?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATUTORY PROVISIONS INVOLVED 2

INTRODUCTION 2

STATEMENT OF THE CASE 3

I. Factual background 3

II. The Ninth Circuit's decision 5

III. Dissenting opinion 7

IV. Dissent from denial of rehearing en banc 8

REASONS FOR GRANTING THE PETITION 9

I. The Ninth Circuit's use of "foreseeability" to establish proximate causation on a prisoner's denial-of-access claim is contrary to this Court's decisions. 10

II. The Ninth Circuit's use of "foreseeability" to establish proximate causation conflicts with decisions from other circuits 14

III. The Ninth Circuit's foreseeability test for denial-of-access cases will increase litigation and expand the potential liability of prison officials in every State in the circuit. 15

IV. The Ninth Circuit's qualified-immunity analysis is contrary to prior decisions of this Court 16

CONCLUSION 20

APPENDIX

42 U.S.C. § 1983 ..... App. 1

Order Denying Petition for Rehearing and Petition for Rehearing En Banc ..... App. 2

Ninth Circuit Opinion ..... App. 4

District Court's Opinion and Order ..... App. 41

District Court's Findings of Fact and Conclusions of Law ..... App. 77

Judgment ..... App. 82

TABLE OF AUTHORITIES

Page

Cases Cited

Anderson v. Creighton,
483 U.S. 635 (1987) 17

Arkansas v. Sullivan,
532 U.S. 769 (2001) 3

Boivin v. Black,
225 F.3d 36 (1st Cir. 2000) 14

Broudy v. Mather,
460 F.3d 106 (D.C. Cir. 2006) 14

Christopher v. Harbury,
536 U.S. 403 (2002) 3, 4, 10

Gentry v. Duckworth,
65 F.3d 555 (7th Cir. 1995) 14

Gonzales v. Thomas,
547 U.S. 183 (2006) 3

Harrell v. Keohane,
621 F.2d 1059 (7th Cir. 1980) 14

Horn v. Banks,
536 U.S. 266 (2002) 3

Johnson v. Parke,
642 F.2d 377 (10th Cir. 1981) 14

Lewis v. Casey,
518 U.S. 343 (1996) 3, 5, 7, 8, 10, 11, 17

Porter v. Nussle,
534 U.S. 516 (2002) 15

Saucier v. Katz,
533 U.S. 194 (2001) 3, 7, 17, 18, 19

Siggers-El v. Barlow,
412 F.3d 693 (6th Cir. 2005) 19

Simkins v. Bruce,
406 F.3d 1239 (10th Cir. 2005) 18

Woodford v. Ngo,
126 S. Ct. 2378 (2006) 15

Constitutional and Statutory Provisions

28 U.S.C. § 1254(1) 1

42 U.S.C. § 1983 ..... 2, 4

42 U.S.C. § 1997 15

Fed. R. App. P. 32(a)(3) 14

Or. R. App. P. 5.05(4)(i) 13

U.S. Const. Amend. I 2, 4

U.S. Const. Amend. V 4

U.S. Const. Amend. XIV 2, 4

Administrative Rules

Or. Admin. R. 291-139-0005(2) 12

Or. Admin. R. 291-139-0040(1)(a) (1998) 12

Or. Admin. R. 291-139-0040(5)(a) (1998) 12

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The Opinion and Order of the United States District Court for the District of Oregon granting plaintiff's motion for summary judgment as to liability on his access-to-courts claim was reported at 338 F. Supp. 2d 1148 (D. Or. 2003), and is reproduced at App. 41-76. The district court's Findings of Fact and Conclusions of Law awarding plaintiff compensatory damages of $1,500 were not reported. They are reproduced at App. 77-81.

The decision of the United States Court of Appeals for the Ninth Circuit affirming on liability is reported at 477 F.3d 1070 (9th Cir. 2007), and is reproduced at App. 4-40. The Ninth Circuit's order denying defendant Lynn Hust's petition for panel rehearing or for rehearing en banc, and the accompanying dissent, are reported at 2007 U.S. App. LEXIS 23639 (9th Cir. 2007), and are reproduced at App. 2-3.

STATEMENT OF JURISDICTION

The Ninth Circuit entered the decision at issue on February 13, 2007. App. 4. The Ninth Circuit denied Hust's timely petition for panel rehearing or for rehearing en banc on September 14, 2007. App. 2. This petition is timely because it is filed within 90 days of the order denying rehearing en banc. Sup. Ct. R. 13.3. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution states in full, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." The Fourteenth Amendment to the United States Constitution provides in relevant part, "nor shall any state deprive any person of life, liberty, or property, without due process of law."

STATUTORY PROVISIONS INVOLVED

The provisions of 42 U.S.C. § 1983 are set out in the appendix to this petition at App. 1.

INTRODUCTION

The Ninth Circuit held that (1) a prison librarian violated a prisoner's constitutional right of access to courts when she denied the prisoner's request to use the library's comb-binding machine to bind a petition for certiorari, even though comb-binding is not required by this Court's rules; and (2) the librarian is not entitled to qualified immunity from damages because a reasonable prison official in her position would know that denying the prisoner's request to comb-bind his petition violated clearly established law. According to the Ninth Circuit, the librarian is liable because the prisoner's failure to file a timely petition was foreseeable, even though that injury was not actually caused by the librarian's conduct. The Ninth Circuit's use of "foreseeability" to establish

proximate causation is contrary to *Lewis v. Casey*, 518 U.S. 343 (1996), *Christopher v. Harbury*, 536 U.S. 403 (2002), and decisions in other circuits. The Ninth Circuit's denial of qualified immunity is contrary to *Saucier v. Katz*, 533 U.S. 194 (2001).

Ten circuit judges dissented from the order denying rehearing en banc in this case, expressing their "utter astonishment that we're leaving an opinion on the books that not only denies the prison librarian qualified immunity but actually holds her liable." App. 3 (Kozinski, J., dissenting). Because the Ninth Circuit's error is "obvious," this Court should grant the petition for certiorari and summarily reverse. *Gonzales v. Thomas*, 547 U.S. 183, 185 (2006); *see also Horn v. Banks*, 536 U.S. 266, 267 (2002) (summary reversal appropriate where decision "directly contravene[s]" Supreme Court precedent); *Arkansas v. Sullivan*, 532 U.S. 769, 771 (2001) (summary reversal appropriate where decision is "flatly contrary to this Court's controlling precedent"). Alternatively, this Court should grant the petition and set the case for briefing and argument. The Ninth Circuit's use of forseeability to establish proximate causation on a prisoner's denial-of-access claim—and its analysis in denying qualified immunity—threatens to significantly expand the responsibilities and liability of prison officials in every state in the Circuit.

STATEMENT OF THE CASE

I. Factual background

Plaintiff Frank Phillips was convicted in Oregon state court of second degree manslaughter and other crimes. He sought post-conviction relief in the Oregon

courts, challenging his manslaughter conviction by contending that his counsel's assistance had been constitutionally deficient. The Oregon courts denied relief, and Phillips planned to seek review by filing a petition for writ of certiorari in this Court. The deadline for filing a timely petition was June 18, 2001. On June 13, 2001, the prison librarian, defendant Lynn Hust, received Phillips's written request to use the comb-binding machine for "a brief that needs to be bound and sent soon." App. 7. Hust responded on June 18 that "we do not comb bind materials for inmates." App. 7. Phillips had been allowed to use the comb-binding machine on prior occasions. Phillips was ultimately allowed to use the comb-binding machine on June 29, eleven days after the deadline for filing a timely petition for certiorari. This Court rejected Phillips's comb-bound petition as "out of time." App. 7.

Phillips then filed suit in the United States District Court for the District of Oregon under 42 U.S.C. § 1983, alleging (among other things) that Hust had violated his First Amendment right of access to the courts[1] by refusing to let him use the prison library's comb-binding machine in time to file his petition for

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[1] The constitutional right of access to the courts is well established, though its textual basis is "unsettled," with prior decisions grounding the right in the Article IV Privileges and Immunities Clause, the First Amendment Petition Clause, the Fifth Amendment Due Process Clause, and the Fourteenth Amendment Equal Protection and Due Process Clauses. *Christopher*, 536 U.S. at 415 n. 12.

certiorari. The parties filed motions for summary judgment that the district court treated as cross-motions. The district court denied Hust's motion for summary judgment, granted Phillips's motion for summary judgment as to liability on the denial-of-access claim, and denied it as to his other claims. Phillips's other claims were eventually settled, and the court held a bench trial to determine damages on the denial-of-access claim. The district court ultimately awarded Phillips $1,500 in compensatory damages on that claim. App. 9.

II. The Ninth Circuit's decision

The Ninth Circuit affirmed as to liability, vacated the judgment and remanded "for the limited purpose of allowing [the] district court to supplement its findings regarding its award of damages." App. 26. The court noted that, under *Lewis*, state prisoners have a constitutional right of access to the courts, a right that includes the opportunity "to prepare, file, and serve pleadings and documents essential for pleading their causes." App. 13 (citing *Lewis*, 518 U.S. at 346). The court acknowledged that this right "does not demand that any means of preparation selected by the inmate be made available, so long as the inmate has some means of preparing documents that comply with the rules of the court in which his case is pending." App. 13. The court also acknowledged that "Phillips must show that the alleged violation of his rights was caused by Hust, the state actor." App. 12-13. Nevertheless, the court did not determine whether combbinding a petition for certiorari was required to "comply with the rules" of this Court. Instead, the court

examined whether Phillips's failure to file a timely petition was foreseeable, because "[t]he touchstone of proximate cause in a § 1983 action is foreseeability." App. 13.

The Ninth Circuit concluded that Phillips's failure to file a timely petition "was entirely foreseeable," because denying his request to comb-bind the petition was "arbitrary," and it was foreseeable to Hust "that this arbitrary denial would obstruct Phillips's ability to prepare his petition and file it in a timely manner." App. 15. Thus, the court concluded that Hust's refusal to allow Phillips to use the comb-binder on this occasion "quite predictably interfered with his efforts to prepare his petition for certiorari and thereby violated his right of access to the courts." App. 15-6. The court was "unpersuaded" by Hust's argument that her actions did not cause Phillips's injury "because the Supreme Court's rules do not require comb-binding." App. 16. The Ninth Circuit thought the Supreme Court rules were "less than clear as to whether some form of binding is required in the circumstances presented in this case, where Phillips's petition was too long for stapling, the method specified in the rules." App. 16. Hust's suggestion "that the rule permits the filing of unbound petitions where stapling is impossible" was rejected; the court thought that was "one reasonable view of the rule, [but] it is not the only reasonable interpretation." App. 16-17. According to the court, Hust's actions placed Phillips "in the untenable position of having to decide whether to file the petition on the date it was due in the hopes that it would be accepted unbound or partially bound, or to

wait until he could bind the petition in the hopes that it would be accepted late." App. 17.

The Ninth Circuit also rejected Hust's contention that she was entitled to qualified immunity even if her actions violated Phillips's right of access to the courts. The court acknowledged that, under the qualified-immunity analysis in *Saucier*, the "'relevant, dispositive inquiry in determining whether a [constitutional] right is clearly established is whether it would be clear to a reasonable officer his conduct was unlawful in the situation he confronted.'" App. 18 (quoting *Saucier,* 533 U.S. at 201). The court stated that this inquiry "'must be undertaken in light of the specific context of the case.'" App. 19 (quoting *Saucier,* 533 U.S. at 201). Nevertheless, the Ninth Circuit concluded that "'a reasonable official in [Hust's] position should know that if her actions could *foreseeably* result in causing an inmate plaintiff to miss a court filing deadline or violate a published court rule, thereby placing his claims in jeopardy of dismissal, such actions would be unlawful under the clearly established constitutional access to court standards set forth in *Lewis*.'" App. 21 (quoting district court opinion; emphasis added).

III. Dissenting opinion

Judge O'Scannlain dissented "from the court's holding that prison librarian Hust's refusal to allow inmate Phillips access to the prison comb-binding machine hindered his ability to file his petition for certiorari timely in the Supreme Court." App. 26 (O'Scannlain, J., dissenting). He also dissented "from the court's holding that Hust is not entitled to quali-

fied immunity." App. 26. The dissent explained that, "[w]hile *Lewis* recognized that the tools of litigation must be made available when *necessary* to ensure 'meaningful access' to the courts, the majority opinion goes beyond that to require prison officials to provide inmates with whatever tools seem *reasonable* in a given situation, even if not necessary to vindicate the inmate's right of action." App. 27 (emphasis in original). According to the dissent, the court's decision "ignores the sensible limitations recognized by the Supreme Court in *Lewis*." App. 27.

The dissent believed that Phillips could prevail on his denial-of-access claim only if he could show "that use of the comb-binding machine was a necessary pre-requisite to allowing him 'meaningful access' to the courts." App. 31. Phillips had not made that showing, according to the dissent, because "[t]he applicable Supreme Court rule neither requires *nor allows* comb-binding" a petition for certiorari. App. 33 (emphasis in original). Thus, the dissent explained, "there is no nexus between the denial of access to the comb-binding machine and the late filing of Phillips's petition." App. 33. The dissent also believed that Hust was entitled to qualified immunity because "it was 'objectively legally reasonable,' even if ultimately mistaken, for Hust to conclude that her denial of access to the comb-binding machine would not hinder Phillips's 'capability' to file his petition." App. 40 (internal citations omitted).

IV. Dissent from denial of rehearing en banc

The Ninth Circuit denied Hust's petition for rehearing and petition for rehearing en banc, with 10

judges dissenting. App. 2-3. Judge Kozinski, writing for the dissenting judges, expressed his "utter astonishment" that the court holds a prison librarian liable for "[f]ailing to help a prisoner bind a brief in a way that's not even permitted, and certainly not required, by the Supreme Court's rules." App. 3 (Kozinski, J., dissenting). The dissent found it

> "perfectly clear that a timely cert. petition, bound or unbound, would have been accepted under Supreme Court Rule 39.3. If the prisoner didn't file it, he has only himself to blame. How the prison librarian violated any of his rights, let alone his clearly established rights, is a mystery that repeated readings of the majority opinion do not dispel."

App. 3. The dissent concluded by expressing the belief that "the Justices, who know their precedents and filing procedures all too well, would not agree with our opinion." App. 3.

REASONS FOR GRANTING THE PETITION

Certiorari should be granted because the Ninth Circuit's decision is clearly wrong. Using foreseeability to establish proximate causation on a prisoner's denial-of-access claim is contrary to this Court's decisions and decisions in other circuits. Denying qualified immunity to the prison librarian in this context is also contrary to this Court's decisions. The Ninth Circuit's decision threatens to expand—inappropriately—prison officials' potential liability in every state in the Circuit.

I. The Ninth Circuit's use of "foreseeability" to establish proximate causation on a prisoner's denial-of-access claim is contrary to this Court's decisions.

A prisoner's constitutional right of access to the courts "guarantees no particular methodology but rather the conferral of a *capability*—the capability of bringing contemplated challenges to sentences or conditions of confinement before the courts." *Lewis,* 518 U.S. at 356 (emphasis added); *see also Christopher,* 536 U.S. at 414 (prisoner claiming denial of right to access courts must show that "[t]he official acts claimed to have denied access * * * caused * * * the loss of an opportunity to seek some particular order of relief"). It follows that the required nexus between the prison official's conduct and the prisoner's lost opportunity to pursue a claim is, as the Court stated in *Christopher,* causation, not foreseeability. The Ninth Circuit erred by concluding that foreseeability alone can establish proximate causation in a denial-of-access claim.

If foreseeability were all that is required, a prisoner could establish a denial-of-access claim whenever prison officials denied him a "particular methodology"—whether or not court rules required that methodology—to prepare and file his claim. In such cases, it might be "foreseeable" that a prisoner requesting a "particular methodology" would not use available alternatives, thus losing the opportunity to pursue his claim. But the right of access guarantees only that prisoners be *capable* of pursuing a claim. It does not give prisoners the right to use a particular

methodology to prepare their claims. That is why the Court has defined the right in terms of what "the inmates need"—not what they request, or what they erroneously may *think* they need—in order to pursue their claims. *Lewis*, 518 U.S. at 355.

Denying Phillips's request to comb-bind his petition did not proximately cause him to miss the filing deadline. Phillips could have filed a timely petition without using the library's comb-binding machine. Under this Court's rules in effect at the time, if Phillips moved to proceed *in forma pauperis*, he could have submitted his petition "stapled or bound at the upper left-hand corner." Sup. Ct. R. 33.2 (1999); *see also* Sup. Ct. R. 12.2 (1999) ("A petitioner proceeding *in forma pauperis** * *shall file an original and 10 copies of a petition for a writ of certiorari prepared as required by Rule 33.2"); Sup. Ct. R. 39.3 (1999) ("every document presented by a party proceeding under this Rule [governing proceedings *in forma pauperis*] shall be prepared as required by Rule 33.2").[2] Rule 39.3 also included an exception: a party proceeding *in forma pauperis* did not need to comply with the preparation requirements of Rule 33.2 if "such preparation is impossible." And the Rule acknowledged that the Clerk will make "due allowance for any case presented under the Rule by a person appearing *pro se*[.]" Sup. Ct. R. 39.3 (1999).

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[2] The record does not reflect whether Phillips ever filed a motion to proceed *in forma pauperis* in this Court.

If Phillips did not move to proceed *in forma pauperis*, he would have been required to submit his petition in a "booklet format" that was "bound firmly in at least two places along the left margin[.]" Sup. Ct. R. 33.1(c) (1999). The rule governing documents submitted in that format stated that "[s]piral, plastic, metal, or string bindings may not be used." *Id.* Thus, comb-binding—which uses plastic spiral material—would not have been permitted if Phillips did not move to proceed *in forma pauperis*.

Because comb-binding a petition for certiorari was not required by the governing Court rules, Phillips did not actually "need" to use the comb-binding machine to file his petition for certiorari. He was not "unable" to file his petition without it. Thus, Hust's refusal to let Phillips use the comb-binding machine did not cause him to miss the filing deadline.[3] The

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[3] Phillips generally had access to the materials and supplies he actually needed pursuant to Administrative Rules adopted by Oregon's Department of Corrections. Those rules establish "policy and procedure for affording inmates reasonable access to law library or contract legal services, and to necessary supplies for the preparation and filing of legal documents with the courts and parole board authorities." Or. Admin. R. 291-139-0005(2) (1998). The rules require each prison library to have supplies "available for inmates...for legal research and the preparation of legal documents." Or. Admin. R. 291-139-0040(1)(a) (1998). Indigent inmates "will be provided such supplies and mailing services...to make required filings with the courts and parole board authorities required by law, and court and procedural rules." Or. Admin. R. 291-139-0040(5)(a) (1998).

Ninth Circuit's use of "foreseeability" to establish the causal link between Hust's actions and Phillips's injury was contrary to prior decisions of this Court. Summary reversal is appropriate because the Ninth Circuit's error is obvious.

The Ninth Circuit may have been led astray by its perception that Hust's actions were "arbitrary." The court thought that Hust's denial of Phillips's request to use the comb-binding machine in this instance was "arbitrary" because "comb-binding was the method the department routinely made available to Phillips on every occasion except the one at issue here." App. 12. But "arbitrariness"—as a matter of law—is not relevant because it is not an element of a denial-of-access claim. A prison official might be liable for arbitrary actions on some other legal theory, but the issue in a denial-of-access claim is whether the prisoner was denied meaningful access to the courts. A prison official who prevents a prisoner from bringing his claim may violate the prisoner's right of access to the courts even if her actions were *not* arbitrary. Conversely, arbitrary action that does not deprive the prisoner of the *capability* of bringing his claim cannot violate the prisoner's right to access the courts.[4]

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[4] In any case, the fact that comb-binding was "routinely" made available to Phillips on other occasions does not necessarily mean that Hust's actions were arbitrary in this instance. Briefs filed in the Oregon Court of Appeals or the Oregon Supreme Court "may be bound with a plastic comb binding, with the binding to be within 3/8 inch of the left edge of the brief." Or. R. App. P. 5.05(4)(i). Comb-binding also may be allowed for briefs, appendices or other papers filed in the

II. The Ninth Circuit's use of "foreseeability" to establish proximate causation conflicts with decisions from other circuits.

No other circuit has used "foreseeability" to establish proximate causation on a prisoner's denial-of-access claim. *See, e.g., Broudy v. Mather,* 460 F.3d 106, 120 (D.C. Cir. 2006) (to establish causation element of denial-of-access claim, "plaintiffs must show that it was the defendants' actions that cut off their remedy"); *Gentry v. Duckworth*, 65 F.3d 555, 558 (7th Cir. 1995) (issue is whether materials requested by petitioner were "necessary to conform his brief to Indiana's procedural rules"; noting that "prisoners are not entitled to limitless supplies [but] merely to that amount minimally necessary to give them meaningful access to court"); *Harrell v. Keohane*, 621 F.2d 1059, 1061 (7th Cir. 1980) (prisoner not entitled to access to photocopier to file a cert. petition because "the rules do not require photocopies"); *Boivin v. Black*, 225 F.3d 36, 42-43 (1st Cir. 2000) (right of access to courts "is narrow in scope" and mandates only "the minimal help necessary" to present a claim); *Johnson v. Parke*, 642 F.2d 377, 380 (10th Cir. 1981) (prisoner entitled to use photocopier because court

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Ninth Circuit. Fed. R. App. P. 32(a)(3) (brief "must be bound in any manner that is secure, does not obscure the text, and permits the brief to lie reasonably flat when open."). The record does not reveal the type of brief Phillips was preparing, or the courts in which the briefs were filed, on the other occasions that he was allowed to use the prison library's comb-binding machine.

rules required him to submit multiple copies of his complaint and there was no practical alternative to photocopying). The Ninth Circuit is the only circuit to hold a prison official liable because it was *foreseeable* that the prisoner would miss the filing deadline if not allowed to use the materials or equipment that he requested—but did not need—to prepare his claim. Certiorari should be granted—and the Ninth Circuit's decision summarily reversed—to eliminate the circuit split created by the decision below.

III. The Ninth Circuit's foreseeability test for denial-of-access cases will increase litigation and expand the potential liability of prison officials in every State in the circuit.

Prisoners can be very litigious. The burden of prisoner litigation on states, corrections officials, and the courts led Congress to enact the Prison Litigation Reform Act of 1995, 110 Stat. 1321-71, as amended, 42 U.S.C. § 1997e *et seq.* ("PLRA"). *See Woodford v. Ngo*, 126 S. Ct. 2378, 2382, 2387 (2006) (noting that PLRA was "designed to bring [prisoner] litigation under control" and that PLRA "attempts to eliminate unwarranted federal-court interference with the administration of prisons"); *Porter v. Nussle*, 534 U.S. 516, 524-25 (2002) (noting that Congress enacted PLRA's exhaustion requirement "to reduce the quantity and improve the quality of prisoner suits; to this purpose, Congress afforded corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case."). The number of prisoner lawsuits will undoubtedly increase if prisoners can state a viable denial-of-access

claim merely by invoking a "foreseeability" standard to establish the causal link between a prison official's conduct and a prisoner's loss of a claim.

Even if it was somehow foreseeable that Phillips would fail to file a timely petition for certiorari after Hust denied his request to use the library's comb-binding machine, Hust's decision did not actually prevent Phillips from filing a timely petition that complied with this Court's rules. Basing liability on foreseeability expands prison officials' potential liability because it is always foreseeable that a prisoner might fail to pursue legal claims after his request for specific types of equipment, materials or assistance is denied. Expanding a prisoner's right of access to courts to include the right to use any equipment, materials or assistance that the prisoner requests—but does not actually need—to pursue his claim thus places a substantial burden on prison officials seeking to avoid liability. The petition should be granted to summarily reverse the decision below (or, alternatively, to set the case for full briefing and argument), preventing an unwarranted and unwise expansion of prison officials' potential liability in a variety of contexts.

IV. The Ninth Circuit's qualified-immunity analysis is contrary to prior decisions of this Court.

In determining whether Hust is entitled to qualified immunity, the Ninth Circuit applied the "clearly

established" standard[5] at a level of generality that is so broad that it renders the requirement essentially meaningless. Hust would have had no inkling that her conduct was unlawful in this situation under then-existing law. Before the Ninth Circuit's decision in this case, no reasonable prison librarian would have thought that denying a prisoner's request to use a comb-binding machine to bind a petition for certiorari would violate the prisoner's right of access to the courts. That is because the prisoner was still *capable* of filing his claim even without access to the comb-binding machine, and because the prisoner's established constitutional right of access only protected prisoners' *capability* of bringing a claim. *See Lewis*, 518 U.S. at 356. No court had previously defined a prisoner's right of access to include a right to equipment, materials or assistance that the prisoner did not actually need to pursue a claim, or held a prison official liable for creating a foreseeable risk of injury that the official did not cause. Qualified immunity should be denied only when "various courts have

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[5] *See Saucier*, 533 U.S. at 201 (requiring courts to determine "whether it would be clear to a reasonable officer his conduct was unlawful in the situation he confronted[,]" an inquiry that "must be undertaken in light of the specific context of the case"). *See also Anderson v. Creighton*, 483 U.S. 635, 639-40 (1987) (explaining that "the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right").

agreed that certain conduct is a constitutional violation under facts not distinguishable in a fair way from the facts presented in the case at hand[.]" *Saucier*, 533 U.S. at 202-03.

The Ninth Circuit offered two explanations for denying qualified immunity to Hust. First, it suggested that applying the "clearly established" inquiry to the specific right claimed here—the right to use the library's comb-binding machine to file a petition for certiorari—"takes this requirement to an absurd level." App. 19. Instead, the court concluded that the "clearly established" requirement was satisfied because "both the right of access to the courts and the right not to be subjected to arbitrary and selective enforcement of prison regulations were clearly established at the time of Hust's action." App. 20. But if that level of generality is all that is required, then *Saucier*'s requirement that the analysis be "undertaken in the specific context of the case" would be completely eviscerated. Qualified immunity under *Saucier* depends on whether the facts of a particular case are "distinguishable in a fair way" from the facts of prior cases finding a constitutional violation. *Saucier*, 533 U.S. at 202-03. The Ninth Circuit's analysis, however, would require no examination of the facts at all. Other circuits have applied a more specific contextual analysis of the facts in deciding whether prison officials are entitled to qualified immunity on denial-of-access claims. *See, e.g., Simkins v. Bruce*, 406 F.3d 1239, 1243 (10th Cir. 2005) (describing the "critical question" under *Saucier* as "whether a reasonable prison official should have known that delaying delivery of plaintiff's legal mail for over a year

would violate his right of access to courts"); *Siggers-El v. Barlow*, 412 F.3d 693, 704 (6th Cir. 2005) (prison official not entitled to qualified immunity where "a reasonable officer would certainly know that a retaliatory transfer for a prisoner's exercise of his right to access the courts which inhibits the prisoner's ability to access the courts").

The Ninth Circuit's second reason for denying qualified immunity fares no better. The court pointed out that Hust "did not deny access to the comb-binding machine because *she reasonably believed* that cert. petitions need not be bound." App. 20 (emphasis added). That could not be the case, the court reasoned, because Hust acknowledged that "she did not know" that Phillips was filing a petition for certiorari. App. 20. But that reasoning is flawed because the relevant inquiry is not whether Hust knew the type of brief Phillips wanted to file. Rather, the "relevant, dispositive inquiry* * *is whether it would be clear to a reasonable officer his conduct was unlawful in the situation he confronted." *Saucier*, 533 U.S. at 202. As noted above, comb-binding is *allowed* by the Oregon appellate courts and the Ninth Circuit, but it is not *required* by any court. Thus, it would not be "clear" to a reasonable prison librarian that denying a prisoner's request to use a comb-binding machine would be unlawful. That is true regardless of the type of brief the prisoner wanted to bind and regardless of the court in which he wished to appear.

The Ninth Circuit extended prisoners' right of access to courts to include requested equipment, materials, or assistance that is not actually needed to pur-

sue a claim, and held Hust liable because it was foreseeable that Phillips would miss the filing deadline if he was not allowed to comb-bind his cert. petition. The law announced by the Ninth Circuit was not "clearly established" at the time of Hust's actions. Thus, on the "dispositive inquiry," it would not be clear to a reasonable prison official in Hust's position that her conduct would violate a prisoner's right of access to the courts. Even if Hust did violate Phillips's rights, it therefore follows that Hust is entitled to qualified immunity.

CONCLUSION

The Ninth Circuit's decision is plainly wrong and quite significant. This Court should grant the petition for certiorari and summarily reverse. Alternatively, the Court should grant the petition and set the case for briefing and argument.

Respectfully submitted,
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December 20, 2007

APPENDIX

THE CODE OF THE LAWS OF THE UNITED STATES OF AMERICA

CHAPTER 21. CIVIL RIGHTS

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(R.S. § 1979; Dec. 29, 1979, P.L. 96-170, § 1, 93 Stat. 1284; Oct 19, 1996, P.L. 104-317, Title III, § 309(c), 110 Stat. 3853.)

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FRANK MARVIN PHILLIPS,

Plaintiff-Appellee,

v.

LYNN HUST,

Defendant-Appellant.

No. 04-36021

D.C. No. CV-01-01252-ALH

District of Oregon, Portland

ORDER DENYING PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

Filed September 14, 2007

Before: James R. Browning, Dorothy W. Nelson, and Diarmuid F. O'Scannlain, Circuit Judges.

Order;
Dissent by Judge Kozinski

ORDER

Judge Browning and Judge Nelson have voted to deny the petition for rehearing and have recommended denying the petition for rehearing en banc. Judge O'Scannlain has voted to grant the petition for rehearing and petition for rehearing in banc.

The full court was advised of the petition for rehearing en banc, and a judge requested a vote on whether to rehear the matter en banc. The case failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35

The petition for rehearing and the petition for rehearing en banc are **DENIED.**

KOZINSKI, Circuit Judge, dissenting from the order denying the petition for rehearing en banc, joined by O'SCANNLAIN, KLEINFELD, GOULD, TALLMAN, BYBEE, CALLAHAN, BEA, M. SMITH and IKUTA, Circuit Judges:

All I can add to Judge O'Scannlain's bulls-eye dissent is my utter astonishment that we're leaving an opinion on the books that not only denies the prison librarian qualified immunity but actually holds her liable. Her transgression? Failing to help a prisoner bind a brief in a way that's not even permitted, and certainly not required, by the Supreme Court's rules. It's perfectly clear that a timely cert. petition, bound or unbound, would have been accepted under Supreme Court Rule 39.3. If the prisoner didn't file it, he has only himself to blame. How the prison librarian violated any of his rights, let alone his clearly established rights, is a mystery that repeated readings of the majority opinion do not dispel. I suspect that the Justices, who know their precedents and filing procedures all too well, would not agree with our opinion.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FRANK MARVIN PHILLIPS,

Plaintiff-Appellee,

v.

LYNN HUST, Library Staff

Defendant-Appellant.

No. 04-36021

D.C. No. CV-01-01252-ALH

OPINION

Appeal from the United States District Court
For the District of Oregon
Ancer L. Haggerty, District Judge, Presiding

Submitted December 9, 2005*
Portland, Oregon

Filed February 13, 2007

Before: James R. Browning, Dorothy W. Nelson, and Diarmuid F. O'Scannlain, Circuit Judges.

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* This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Opinion by Judge Browning;
Dissent by Judge O'Scannlain

COUNSEL

Hardy Myers, Attorney General, Mary H. Williams, Solicitor General, and Richard D. Wasserman, Attorney-in-Charge, Civil/Administrative Appeals Unit, Salem, Oregon, for the appellant.

Frank Marvin Phillips, pro se, Salem Oregon, for the Appellee.

OPINION

BROWNING, Circuit Judge:

In this case, we must decide whether the arbitrary denial by prison officials of access to materials the prison routinely made available to inmates for the preparation of legal documents constitutes a denial of an inmate's right of access to the courts where it results in the loss of a legal claim. We hold that it does.

Defendant-Appellant Lynn Hust appeals the grant of summary judgment in favor of Plaintiff-Appellee Frank M. Phillips, Jr. on his claim under 42 U.S.C. § 1983, and the denial of her motion for summary judgment asserting qualified immunity. In addition, Hust appeals the district court's damages award.

We have jurisdiction under 28 U.S.C. § 1291 over this appeal of the final judgment of the district court. We affirm the grant of summary judgment to Phillips and the denial of Hust's qualified immunity claim, and we remand the case to the district court to make further factual findings concerning its award of damages.

I.

Phillips was convicted in state court of second degree manslaughter and sentenced to an indeterminate term of ten years imprisonment, with a minimum sentence of five years for using a firearm during the commission of the offense. Phillips completed his sentence and was subsequently incarcerated for other crimes. Phillips sought state court post-conviction relief challenging his manslaughter conviction on the grounds that he received ineffective assistance of counsel. After exhausting his appeals in state court, he intended to seek review of his claim in the United State Supreme Court, where he hoped to show that the state courts had violated the Constitution by applying a preponderance of the evidence standard in finding that any ineffective assistance he received did not affect the outcome of his criminal trial.

Phillips's petition for certiorari had a filing deadline of June 18, 2001. On June 3, 2001, Phillips sent an inmate communication (a "kite") directed to "Ms. Fendley" requesting access to the comb-binding machine. Phillips had in the past been permitted to use the comb-binder to bind a brief to the Oregon Supreme Court. In addition, Phillips had already partially comb-bound his petition, and he was seeking

access to the comb binder in order to insert an additional 40 pages. He was called to the library on June 8, 2001 for the purpose of binding his petition for certiorari, but the comb-binding machine had been moved, and he was unable to bind the petition on that date. Three days later, on June 11, 2001, Phillips sent another kite directed to "Ms. Rossi/Hust" stating that "I have a brief that needs to be bound and sent soon. Please schedule me for any MORNING to briefly use the comb punch (1 hour will do.)." This kite did not inform Hust of the filing deadline or that the document Phillips wished to bind was a petition for writ of certiorari to the Supreme Court. Hust received the kite no later than June 13, 2005. On June 18, the day Phillips's cert. petition was due, Hust responded "[w]e do not comb bind materials for inmates." Evidence in the record showed that the usual response time for such kites was 1 to 2 days. In a sworn statement, Hust asserted that prison rules in effect at the time did not permit inmates to comb bind their own materials, and that in the past, inmates had been permitted to submit filings bound with a staple or unbound. Nevertheless, upon receiving this response from Hust, Phillips sent a kite to Hust's supervisor, Program Services Manager Gilmore, with the inscription "Legal Emergency" at the top and requesting access to the comb binder. Gilmore granted this request on June 25, one week after Hust had denied Phillips access to the comb-binder. Hust did not permit Phillips to enter the law library until June 29, 2001, at which time he comb punched his materials, bound his petition, and filed it with the Supreme Court. The Supreme Court rejected the petition as "out of time."

Phillips and Hust had a history of strained relations resulting from an incident in which Phillips, in violation of prison policy, used a prison typewriter to draft a letter to the West Group to inquire about some advance sheets missing from the library's collection. Misinterpreting Phillips's letter as a request for replacement advance sheets, West mailed duplicates to the prison library. Hust initiated disciplinary proceeding against Phillips charging him with Unauthorized Use of a Computer II, Mail Fraud, Disobedience of an Order II, Forgery, Disrespect III, and Extortion II. All of these charges, classified as major, were rejected by the hearing officer, who found him guilty only of a minor violation, Disobedience of an Order IIII for unauthorized use of the typewriter.

On April 4, 2002, Phillips brought suit in the United States District Court for the District of Oregon alleging three causes of action under 42 U.S.C. § 1983, one for impeding his right to freely associate, communicate, and correspond with others relating to Hust's initiation of disciplinary proceedings, one for Hust's violation of Phillips's right of access to the courts, and one for retaliation relating to her denial of access to the comb binder. In mid-August 2002, both parties filed motions for summary judgment, which the district court treated as cross-motions. The district court granted Phillips's summary judgment motion on March 31, 2003, as to his right of access to the courts claim as to liability, and denied it as to the others claims. The court reserved the issue of damages for Phillips's access to the courts claim for trial. In the same order, the district court denied Hust's

summary judgment motion. Subsequently, the parties settled Phillips's other two claims.

The court held a bench trial on September 20, 2004 on the damages issues. At the trial, Phillips sought non-economic damages, essentially mental and emotional distress, as well as economic damages in the amount of his costs and expenses in the state court post-conviction proceedings he was attempting to appeal to the Supreme Court. In addition, he sought punitive damages. On September 29, the court entered its findings of fact and conclusion of law awarding Phillips $1500 in compensatory damages, but denying punitive damages. In regards to Phillips's request for the cost of the state court proceedings, the court observed the proper time for seeking such costs was after the entry of judgment via a bill of costs. The district court entered its final judgment on September 29, 2004. On October 18, 2004, Phillips submitted a bill of costs. The district court denied the request for costs on November 18, 2004, on the grounds that Phillips sought to recover only the costs of his state court post-conviction relief action, which the district court held were not available as costs in the present action, and which the court further stated had been awarded as part of compensatory damages.

II.

We review *de novo* the district court's decision on cross motions for summary judgment. *Parents Involved in Cmty. Schools v. Seattle School Dist. No. 1*, 426 F.3d 1162, 1172 n. 11 (9th Cir. 2005) (en banc). Our review is governed by the same standard used by the trial court under Fed. R. Civ. P. 56(c). *Suzuki Mo-*

tor Corp. v. Consumers Union, Inc., 330 F.3d 1110, 1131 (9th Cir. 2003). Under Rule 56(c), we must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Id.*

[1] Under the First and Fourteenth Amendments to the Constitution, state prisoners have a right of access to the courts. *Lewis v. Casey*, 518 U.S. 343, 346 (1996). "[A]ccess to the courts means the opportunity to prepare, serve and file whatever pleadings or other documents are necessary or appropriate in order to commence or prosecute court proceedings affecting one's personal liberty." *Id.* at 384 (quoting *Hatfield v. Bailleaux*, 290 F.2d 632, 637 (9th Cir. 1960)). This right "requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." *Bounds v. Smith*, 430 U.S. 817, 828 (1977).

Where a prisoner asserts a backward-looking denial of access claim — one, as here, seeking a remedy for a lost opportunity to present a legal claim — he must show: 1) the loss of a "nonfrivolous" or "arguable" underlying claim; 2) the official acts frustrating the litigation; and 3) a remedy that may be awarded as recompense but that is not otherwise available in a future suit. *See Christopher v. Harbury*, 536 U.S. 403, 413-14 (2002).

A.

[2] The first element, requiring the loss of a non-frivolous underlying claim, goes to the plaintiff's standing to bring suite. To have standing to assert a claim of denial of access to the courts, an inmate must show "actual injury." *Lewis*, 518 U.S. at 351. In order to establish actual injury, the inmate must demonstrate that official acts or omissions "hindered his effort to pursue a [nonfrivolous] legal claim." *Id.* at 351, 353, 353 n. 3.

[3] Here, Hust's refusal to allow Phillips access to the comb-binding machine hindered Phillips's ability to timely file his petition for certiorari seeking review of his state court post-conviction relief action. This action resulted in the petition being rejected as untimely and thus caused "actual prejudice with respect to contemplated or existing litigation." *Id.* at 348.

We reject Hust's argument that Phillips's post-conviction claims were frivolous. Phillips's petition for certiorari presented the issue, *inter alia*, whether the state court, in finding that Phillips's counsel committed no error that "would have produced a different result" in his trial, applied a preponderance of the evidence standard in violation of U.S. Supreme Court strictures. While the state court recited the correct standard, it is certainly arguable, based upon the language of the court's opinion, that it did not apply it. Accordingly, Phillips's petition for certiorari was not frivolous.

[4] Hust further contends that in order to show that his legal claims were not frivolous, Phillips must establish not only that the claims have merit, but also that they meet one of the criteria for certiorari specified in the Supreme Court's Rule 10. Rule 10, however, clearly indicates that the delineated criteria do not control or provide the measure of the Court's discretion in granting certiorari. We will not presume to speculate what the Supreme Court might in its discretion have done had it been presented with a timely petition. For similar reasons, we have held that, in order to establish actual injury, a plaintiff "need not show, ex post, that he would have been successful on the merits had his claim been considered." *All v. Sakai*, 48 F.3d 1082, 1085 (9th Cir. 1994). We think it equally apparent that where the suit underlying an access to the courts claim was to be brought in a court having discretionary jurisdiction, the plaintiff need not establish, ex post, that the court would have exercised its discretion and accepted the case. *Cf. Gentry v. Duckworth*, 65 F.3d 555, 559 (7th Cir. 1995) (plaintiff adequately alleged actual injury where state court retained discretion to address post-conviction claims notwithstanding that claims had been procedurally defaulted).

B.

[5] Under *Harbury's* second element, Phillips must show that Hust's denial of use of the comb-binding machine frustrated his attempt to press his claim in the Supreme Court. In other words, as in any § 1983 case, Phillps must show that the alleged violation of his rights was proximately caused by Hust, the

state actor. *See Crumpton v. Gates*, 947 F.2d 1418, 1420 (9th Cir. 1991) (citing *Parratt v. Taylor*, 451 U.S. 527, 535 (1981)). The touchstone of proximate cause in a § 1983 action is foreseeability. *See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Regional Planning Agency*, 216 F.3d 764, 784-85 (9th Cir. 2000) (citing *Arnold v. IBM Corp.*, 637 F.2d 1350, 1355 (9th Cir. 1981)).

[6] Hust argues that Phillips cannot show that her actions caused the late filing of Phillips's petition because he could have used an alternate means of binding his petition for certiorari or he could have submitted the petition unbound. We think this contention misses the point. Even if Hust's actions were not an insurmountable obstacle to Phillips's attempt to assert his claim, Hust effectively prevented Phillips from filing her cert. petition by arbitrarily and selectively denying him access to the comb-binding machine.

[7] The Constitution requires that prison officials make it possible for inmates to prepare, file, and serve pleadings and other documents essential for pleading their causes. *Lewis*, 518 U.S. at 346. Of course, the Constitution does not demand that any means of preparation selected by the inmate be made available, so long as the inmate has some means of preparing documents that comply with the rules of the court in which his case is pending. Thus, we have held that inmates have no right to a typewriter to prepare legal documents where court rules permit pro se litigants to hand-write their pleadings. *Lindquist v. Idaho State Bd. Of Corrections*, 776 F.2d 851, 858

(9th Cir. 1985) (citing *Twyman v. Crisp*, 854 F.2d 352, 358 (10th Cir. 1978)). Nevertheless, it remains true that *some* means of preparing legal documents, including a means of binding them where required, must be made available.

[8] Here, the uncontradicted evidence in the record indicates that, despite any alleged policy to the contrary, comb-binding was the method the department routinely made available to Phillips on every occasion except the one at issue here. Whether or not the department had a policy prohibiting inmates from using the comb-binder or prohibiting library staff from comb-binding inmate documents is irrelevant. Such a policy, if indeed it existed, was either routinely not enforced or was enforced intermittently and arbitrarily at the caprice of the individual official responding to a request for access.

[9] We have held that an inmate's constitutional rights, including the right of access to the courts, may be violated by the arbitrary and selective enforcement of otherwise valid policies. For example, in *Baumann v. Arizona Dept. of Corrections*, 754 F.2d 841, 845 (9th Cir. 1985), the state denied an inmate a work furlough on the grounds that the policy establishing his eligibility was not part of a published regulation as required by state law. We held that, although the publication requirement was otherwise valid, "the state cannot arbitrarily deny privileges based on the lack of regulations if it grants privileges under unfiled regulations to other prisoners." *Id.* We held that such selective enforcement of regulations could constitute a violation of the inmate's due process rights if

it resulted in a deprivation of a prisoner's liberty interests. *Id.* Similarly, in *Gluth v. Kangas* 951 F.2d 1504, 1508 (9th Cir. 1991), we held that arbitrarily denying access to a prison library despite space availability could constitute a violation of the right of access to the courts, even if the regulations governing access were arguably facially valid.[1] In more general terms, "practices that unjustifiably obstruct the availability of professional representation or other aspects of the right of access to the courts are invalid." *Leeds v. Watson*, 630 F.2d 674, 676 (9th Cir. 1980).

[10] Hust has offered no justification for the enforcement of the regulation restricting access to the comb-binder on June 18 but not on any other occasion. Moreover, it was entirely foreseeable that this arbitrary denial would obstruct Phillips's ability to prepare his petition and file it in a timely manner. Hust's refusal to permit Phillips to use the comb-binder on June 18, when he was permitted to use it on numerous occasions both before and after that date, and when he had, so far as the record reveals, never before been denied access to it, quite predictably interfered with his efforts to prepare his petition

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[1] Other circuits have looked with similar disfavor on the arbitrary enforcement of valid regulations. *See, e.g., Reed v. Faulkner*, 842 F.2d 960, 964 (7th Cir. 1988) (holding selective enforcement of hair length rules against some groups asserting religious exemption but not others could constitute violation of equal protection, despite the general validity of the rules).

for certiorari and thereby violated his right of access to the courts.[2]

[11] That Hust was unaware of the deadline for the filing or the court in which the document was to be filed does not affect this result. It was entirely foreseeable that denying Phillips access to the comb-binder inconsistently with well established past practice would interfere with Phillips's ability to file the document in *any* court.

We are similarly unpersuaded by Hust's contention that her actions did not deny Phillips's right of access to the courts because the Supreme Court's rules do not require comb-binding. As the district court observed, the rules are less than clear as to whether some form of binding is required in the circumstances presented in this case, where Phillips's petition was too long for stapling, the method specified in the rules. Although Hust's suggested interpretation — that the rule permits the filing of unbound petitions where stapling is impossible — may be one

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[2] In so concluding, we do not hold that inmates have the right to comb-binding equipment, or, indeed, to any particular method of binding documents, so long as they are able to meet the filing requirement of the courts in which they are litigating their claims. Rather, we simply reach the unexceptional conclusion that otherwise valid prison policies may not be selectively or arbitrarily enforced in such a way as to interfere with prisoners' access to the courts to pursue litigation arising from their incarceration.

reasonable view of the rule, it is not the only reasonable interpretation. Thus, Hust's refusal to allow Phillips to use the comb-binder placed him in the untenable position of having to decide whether to file the petition on the date it was due in the hopes that it would be accepted unbound or partially bound, or to wait until he could bind the petition in the hopes that it would be accepted late. Because it was Hust's actions that placed Phillips in the position of having to make this choice, she cannot now make the complaint — highly speculative in any event — that Phillips made the wrong choice.

C.

[12] Phillips also satisfies *Harbury's* third requirement that the plaintiff have no other remedy than the relief available in his denial of access suit. Unlike the plaintiff in *Harbury*, Phillips has no independent tort cause of action against Hust for the violation of his rights. Moreover, even if state law permitted Phillips to file a successive post-conviction relief suit, such a suit could not provide the relief Phillips seeks here, namely compensation for the expense and effort of the earlier litigation, for which any hope of vindication, however slim, was lost as a result of the untimely filing of his petition for certiorari.

[13] For these reason, Hust's arbitrary denial of access to the only practicable binding material available in the prison library, and contrary to the prison's established past practice, violated Phillips's right of access to the courts. Accordingly, we affirm the district court's grant of summary judgment to Phillips.

III.

Hust contends that, even if her actions amounted to a violation of Phillips's rights, the right was not clearly established and she is therefore entitled to qualified immunity. We disagree.[3]

[14] Qualified immunity protects "government officials... from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In *Saucier v. Katz*, the Supreme Court set out a two step inquiry in determining whether an official has qualified immunity. 533 U.S. 194, 201 (2001). First, "taken in the light most favorable to the party asserting the injury, do the facts show the officer's conduct violated a constitution right?" *Id.* "The relevant, dispositive inquiry in determining whether a right is clearly established is whether is would be clear to a reasonable officer his conduct was unlawful in the situation he confronted." *Id.*

[15] Here, we have held that Hust violated Phillips's right of access to the court when she arbitrarily denied him access to the comb-binder contrary to the consistent practice of the prison both before and after the event at issue, satisfying *Saucier's* first prong.

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[3] The district court, too, rejected Hust's claim of qualified immunity. We review its decision *de novo*. *Elder v. Holloway*, 510 U.S. 510, 516 (1994).

Hust argues that Phillips's right of access to the courts was not clearly established in this instance because no case specifically requires that prison officials must provide comb-binding to inmates filing petitions with the Supreme Court. Whether the right at issue in a claim of qualified immunity is clearly established is judged as of the date of the incident alleged and is a pure question of law, which we review *de novo*. *Act Up!/Portland v. Bagley*, 988 F.2d 868, 873 (9th Cir. 1993). In *Saucier*, the Supreme Court held that the "clearly established" inquiry "must be undertaken in light of the specific context of the case." 533 U.S. at 201. Hust's contention, however, takes this requirement to an absurd level, which is contrary to *Saucier's* observation that when "various courts have agreed that certain conduct is a constitutional violation under facts not distinguishable in a fair way from the facts presented in the case at hand, the officer would not be entitled to qualified immunity." *Id.* at 202-03. Here faced with the Supreme Court's decision in *Lewis* and *Bounds*, and numerous prior and subsequent cases, a reasonable officer would know that failing to provide access to equipment and supplies needed in order "to prepare, serve and file" court documents would result in prisoners' claims being "dismissed for failure to satisfy...technical requirements" or would otherwise frustrate prisoners' litigation efforts. *See, e.g., Lewis*, 518 U.S. at 351, 384. Moreover, both our case-law and the law of other circuits holds that prison rules may not be enforced arbitrarily or selectively in such a way as to violate prisoners' constitutional or statutory rights, including the right of access to the courts. *Gluth*, 951 F.2d at

1508; *Baumann*, 754 F.2d at 845; *Reed*, 842 F.2d at 964. Thus, both the right of access to the courts and the right not to be subjected to arbitrary and selective enforcement of prison regulations were clearly established at the time of Hust's action.

The fact that no case had held specifically that prison officials must make comb-binders available does not render it reasonable to deny access to a comb-binder when it is the only means readily available at the facility for binding a legal pleading, and when it had been made available repeatedly on prior occasions, including just one week prior to the occasion at issue, leading to a reasonable expectation that it would be available in time for Phillips to file his petition.

[16] In addition, Hust did not deny access to the comb-binding machine because she reasonably believed that cert. petitions need not be bound. As Hust correctly notes, resolution of the qualified immunity question "will often require examination of the information possessed by the . . . official." *Anderson v. Creighton*, 483 U.S. 635, 641 (1987). As she acknowledges, she did not know that Phillips was filing a cert. petition. She simply issued a blanket refusal to permit access to the comb-binder, regardless of the nature of the document or the rules of any court. Moreover, her refusal was blatantly contrary to past practice as well as state administrative regulations.[4]

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[4] Oregon Administrative Rule 291-149-0005 directly implemented the constitutional requirement, directing that "the Department of Corrections satisfy

As the district court held, "a reasonable official in defendant's position should know that if her actions could foreseeably result in causing an inmate plaintiff to miss a court filing deadline or violate a published court rule, thereby placing his claims in jeopardy of dismissal, such actions would be unlawful under the clearly established constitutional access to court standards set forth in *Lewis*." Therefore, Hust was not entitled to qualified immunity from Phillips's access to the courts claim.

IV.

Having determined that the district court properly granted summary judgment to Phillips on the question of liability, we must now address Hust's contention that the district court's award of damages was improper. A district court's computation of damages is a finding of fact that this Court reviews for clear error. *Amantea-Cabrera v. Potter*, 279 F.3d 746, 750 (9th Cir. 2002).

[17] The purpose of § 1983 damages is to provide compensation for injuries caused by the violation of a plaintiff's legal rights. *Memphis Com. Sch. Dist. v. Stachura*, 477 U.S. 299, 207 (1986). Accordingly, no compensatory damages may be awarded absent proof of actual injury. *Id.* at 308 ("Where no injury [is] present, no 'compensatory' damages [can] be awarded.").

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its legal obligation to provide inmates meaningful access to the courts by affording inmates reasonable access to ... necessary supplies for the preparation and filing of legal documents with the court."

Moreover, "the abstract value of a constitutional right may not form the basis for § 1983 damages." *Id.* at 307 (citing *Cary v. Piphus*, 435 U.S. 247, 255 (1978)).

Hust argues that Phillips has not established that his lost post-conviction claim had any value, and that as a matter of law he may not recover the costs of the state-court proceedings. *Harbury's* requirement that the remedy sought on a backward looking access to the courts claim must be one not available in some other lawsuit suggests that, where a claim has been irrevocably lost as a result of the constitutional violation, one possible measure of the remedy for the loss of access is the remedy which would have been available on the lost claim. *See Harbury*, 536 U.S. at 415, 415 n. 13. Here, had Phillips been able to present his claim to the Supreme Court, and had he prevailed in his effort to overturn his state court conviction, he could have sought damages for, among other possible causes of action, wrongful imprisonment or malicious prosecution. In addition, the collateral civil consequences of overturning the conviction likely have a measurable economic value. Of course, such an outcome is somewhat speculative,[5] and in these circumstances, it would not be inappropriate for the court, in assessing the value of the lost claim, to evaluate the

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[5] Of course, as in other circumstances in which the speculativeness of the damages is the result of the defendant's wrongful conduct, "the court may...give due weight to the fact that the question was made hypothetical by the very wrong of the defendant." Rest. 2d Torts § 774A, cmt. c.

likelihood that the plaintiff would have prevailed in the underlying litigation. *See Simkins v. Bruce*, 406 F.3d 1239, 1244 (10th Cir. 2005) ("In order to prevail on a § 1983 right of access claim and substantiate more than nominal damages, a plaintiff may have to engage the merits of the underlying case."); *Gentry*, 65 F.3d at 560 ("the chances of success [on the underlying claim] are very relevant to the question of damages [in the access to the courts claim]")

[18] Here, however, Phillips requested not the economic value of the remedy he sought in the underlying suit, but his costs in prosecuting that suit over the course of many years, and the district court appears to have based its damages award, at least in part, on that request. Hust argues that, because Phillips could not have recovered his costs had he prevailed in the Supreme Court, he cannot as a matter of law recover them here. This contention misapprehends the nature of the injury Phillips asserts. Phillips is not claiming that Hust's actions deprived him of the opportunity to recover his costs; rather, his claim is that he was robbed of his day in court, of the opportunity to be heard, whether he prevailed or not. Neither party has pointed to any authority addressing the availability of the remedy Phillips seeks, and we have discovered none. Nevertheless, we must acknowledge that the opportunity to press even unsuccessful suits has a value in itself, and is constitutionally protected. *See, e.g., BE & K Const. Co. v. N.L.R.B.*, 536 U.S. 516, 532 (2002) ("even unsuccessful but reasonably based suits advance some First Amendment interests" and may not be unnecessarily burdened). Awarding the costs of the underlying suit

recognizes that Phillips incurred those costs in the expectation that he would be able to exercise those rights and press his legal contentions to the full extent permitted by the law, and even if he was ultimately unsuccessful. Hust's actions cut his efforts short, precluding him from realizing that expectation and destroying the value of his cumulative litigation expenses. Accordingly, we hold that the costs of the litigation that was prematurely cut short by defendant's wrongful conduct is a proper measure of damages in a § 1983 suit for violation of the right of access to the courts.

Nevertheless, the district court made factual findings supporting its award of damages that are insufficient to permit adequate review of the award. "The district court's findings must be explicit enough to give the appellate court a clear understanding of the basis of the trial court's decision, and to enable it to determine the ground on which the trial court reached its decision." *Fed Trad Comm'n v. Enforma Natural Prod., Inc.*, 362 F.3d 1204, 1216 (9th Cir. 2004) (citing *Unt v. Aerospace Corp.*, 765 F.2d 1440, 1444 (9th Cir. 1985)) (internal quotation marks omitted). Where the district court's findings are insufficient to indicate the factual basis for its ultimate conclusion concerning damages, then its finding as to the amount of damages is clearly erroneous. *Amantea-Cabrera*, 279 F.3d at 750.

[19] Here, the district court made no findings at all as to the basis for its valuation of Phillips's post-conviction relief claim, basing its award solely on *Lewis*'s observation that "an arguable (though not yet

established) claim [is] something of value." *Lewis*, 518 U.S. at 353. It made no findings concerning the amount of Phillips's costs in the collateral litigation and it made no findings concerning his claims for mental or emotional injury.[6] Moreover, its remarks as to his claim to recover the costs of the collateral litigation as damages on his § 1983 claim are inconsistent,[7] leaving the record unclear as to whether the damages award included those costs. Because the district court's factual findings were insufficiently clear for us to determine the basis of the amount of its damages award, we vacate the judgment and remand

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[6] Hust argued in the district court that under the Prison Litigation Reform Act, 42 U.S.C. § 1997e(e), damages for emotional distress are unavailable here. She has not renewed this argument on appeal, and it is in any case belied by our decision in *Canell v. Lightner*, 143 F.3d 1210, 1213 (9th Cir. 1998), in which we held that the Prison Litigation Reform act "does not apply to First Amendment Claims regardless of the form of relief sought."

[7] In its post-trial findings, the court had noted that Phillips could seek those costs in a post-judgment bill of costs, suggesting they were not included in its damages award, yet in its ruling on Phillips's bill of costs, the court stated that the state-court costs had been included in the award of damages. These two statements appear irreconcilable, and in any event, the statement in the costs order does not constitute a finding of fact.

the case for the district court to supplement its findings. *See Alpha Distributing Co. of California, Inc. v. Jack Daniels Distiller*, 454 F.2d 442, 453 (9th Cir. 1972).

V.

We AFFIRM the district court's grant of summary judgment to Phillips and denial of summary judgment to Hust on the issue of liability under 42 U.S.C. § 1983 for Hust's violation of Phillip's right of access to the courts. We VACATE the judgment and REMAND for the limited purpose of allowing district court to supplement its findings regarding its award of damages. Phillip's motions for sanctions are DENIED.

O'SCANNLAIN, Circuit Judge, dissenting:

I respectfully dissent from the court's holding that prison librarian Hust's refusal to allow inmate Phillips access to the prison comb-binding machine hindered his ability to file his petition for certiorari timely in the Supreme Court. I must also dissent from the court's holding that Hust is not entitled to qualified immunity.

I.

In *Bounds v. Smith*, 430 U.S. 817 (1977), the Supreme Court held that "the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." *Id.* at 828. In *Lewis*

v. Casey, 518 U.S. 343 (1996), the Court subsequently recognized the limits of *Bounds* when it held that an inmate must demonstrate that official acts or omissions "hindered his efforts to pursue a [non-frivolous] legal claim." *Id.* at 351; *see also id.* at 365 (Thomas J., concurring) ("[T]he majority opinion . . . places sensible and much-needed limitations on the seemingly limitless right to assistance created in *Bounds* . . . ."). While *Lewis* recognized that the tool of litigation must be made available when *necessary* to ensure "meaningful access" to the courts, the majority opinion goes beyond that to require prison officials to provide inmates with whatever tools seem *reasonable* in a given situation, even if not necessary to vindicate the inmate's right of action. In so doing, today's decision ignores the sensible limitations recognized by the Supreme Court in *Lewis*.

A.

At the outset, I note several points of agreement with the majority. First, the court correctly recognizes that in order to prevail on a motion for summary judgment and to merit a remedy for a lost opportunity to present a legal claim, Phillips must affirmatively establish three elements: (1) actual injury in the form of a loss of a non-frivolous underlying legal claim; (2) that official acts hindered his pursuit of the legal claim; and (3) that he is pursuing a remedy that may be awarded as recompense but that is not otherwise available in a future suit. Maj. Op. at 1777-78 (citing *Christopher v. Harbury*, 536 U.S. 403, 413-14 (2002)).

I also agree with the majority that it is "arguable," *Lewis*, 518 U.S. at 351; that at least one of Phillips's claim was non-frivoulous. Maj. Op. at 1778. Specifically, I accept as non-frivolous Phillips's claim that the state court applied a standard that differed from that set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Finally I agree with the court that Phillips is able to point to a "specific instance" in which he was denied access to the courts: his petition for a writ of certiorari was denied as untimely by the Supreme Court. *See Lewis*, 518 U.S. at 356 (describing the loss of an actionable claim).

B.

Despite these points of agreement, I cannot agree with the majority's resolution of this case. Simply stated, Phillips has failed to establish, at the summary judgment stage, that the official actions of the prison librarian were the proximate cause of his loss. *See Arnold v. IBM Corp.* 637 F.2d 1350 (9th Cir. 1981) ("The causation requirement of section 1983 is not satisfied by showing of mere causation in fact. Rather the plaintiff must establish proximate causation.") (internal citations omitted); *Stevenson v. Koskey*, 877 F.2d 1435, 1438-39 (9th Cir 1989).

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In *Lewis*, the Supreme Court made clear that *Bounds* "guarantee[d] no particular methodology but rather the conferral of a *capability*—the capability of bringing challenges to sentences or conditions of confinement before the courts." 518 U.S. at 356 (emphasis added). Capability is defined as the "quality or

state of ability; having the physical, mental or legal power to perform." Webster's Ninth New Collegiate Dictionary 203(1986). The conferral of a capability to bring a non-frivolous legal action does not, however, require states to turn prisoners into litigation machines. As the Supreme Court stated in *Lewis*,

> [*Bounds*] does not guarantee inmates the where-withal to transform themselves into litigating engines . . . The tools it requires to be provided are those that the inmates need in order to attack their sentences, directly or collaterally, and in order to challenge the conditions of their confinement. Impairment of any other litigating capacity is simply one of the incidental (and perfectly constitutional) consequences of conviction and incarceration.

518 U.S. at 355 (emphasis in original).

Thus, in *Lindquist v. Idaho State Bd. Of Corrections*, 776 F.2d 851, 856 (9th Cir. 1985), we rejected the contention of inmates that a prison library must contain the Pacific Reporter 2d, Shepard's Citations and a number of other reference books. We noted that *Bounds* did not require a prison to provide its inmates with "a library that results *in the best possible access to the courts.*" *Id.* (emphasis added). Instead, what *Bounds* required was that the resources meet minimum constitutional standards sufficient to provide meaningful, though perhaps not "ideal," access to the courts. *Id.* We thus had no trouble also concluding that inmates had no right to a typewriter to prepare

their legal documents where the court rules permit pro se litigants to hand-write their pleadings.

The situation in *Lindquist* may be contrasted with that with which we were presented in *Allen v. Sakai*, 40 F.3d 1001 (9th Cir. 1994). In that case, Allen's notice of appeal to the Hawaii Circuit Court was rejected because it was written in pencil and not ink. Allen claimed that the outright denial of a pen deprived him of access to the courts. We held:

> Hawaii's Circuit Court Rule 3(a) requires that all "handwritten entries on papers shall be in black ink," and defendants concede that this mandate was "clear and explicit" and provided no exceptions. In light of the clarity of the preexisting law, it should have been apparent to the defendants that a ban on the use of pens would seriously hamper an inmate's access to the courts and therefore constitute a violation of his rights under *Bounds*.

40 F.3d 1006. *Allen* presented a stark example of how the complete denial of a "clear[ly]" necessary writing utensil — specifically mentioned as a required tool by the *Bounds* court — could effectively deprive an inmate of their right of access to the courts. The result in *Allen* is thus unremarkable. *See also Sands v. Lewis*, 886 F.2d 1166, 1169 (9th Cir. 1989) ("[We] have considered claims based on *Bound's* teaching that the State must provide 'indigent' prisoners with *basic supplies* which ensure that their access is 'meaning-

ful.' In evaluating this latter type of claim, we have *declined to read* into the Constitution any specific minimum requirements beyond those mentioned in Bounds itself.") (Emphasis added); Or. Admin. R. 291-139-0005 (requiring prison officials to make available "*necessary* supplies for the preparation and filing of legal documents") (emphasis added).

Our precedents, therefore, require that for Phillips to prevail on summary judgment, he must make a showing that use of the comb-binding machine was a necessary pre-requisite to allowing him "meaningful access" to the courts.

2.

The majority opinion appears to acknowledge that what is required is the provision of tools sufficient to afford a "capability" of litigation, but then, with a magician's sleight of hand, the focus of the inquiry is shifted to the apparent "arbitrary" nature of Hust's denial. The majority gets it mostly correct, however, it its initial statement that "[n]evertheless, it remains true that some means of preparing legal documents, including a means of binding them *where required*, must be made available." Maj. Op at 1780 (emphasis added). Unfortunately, rather than adhering to the clear limits established by Supreme Court precedent, the majority here mandates prison employees to anticipate when the denial of unnecessary services will so fluster an inmate that his filing, though in no way actually frustrated, might be delayed. Such a rule amounts to an unreasonable demand that prison librarians be not only experts on their actual duties, but also clairvoyant.

Supreme Court Rule 33.2 governs the form of documents to be filed with the Court. It provides that every document "shall be stapled or bound at the upper left-hand corner." In turn, Supreme Court Rule 39.3 governs proceedings in forma pauperis and requires every document presented by a party to be "prepared as required by Rule 33.2 (unless such preparation is impossible)." (emphasis added). It further requires that the petition be legible, obviously expecting most filings to be handwritten. Finally, the rule directs the Clerk to "mak[e] due allowance for any case presented under this Rule by a person appearing pro se."

Three simple points may be made. First, while an initial reading suggests that stapling or binding is affirmatively required, Rule 39.3 provides an exception when such methods are not possible. Second, Rule 33 requires the staple or binding to be at the upper left-hand corner. A comb-binding machine, in contrast, binds an entire side of a petition, and thus does not even come within the rule. Finally, the rule specifically mandates leniency for *pro se* litigants, many of whom the Court is fully aware are indigent prisoners.

The district court's grant of summary judgment, however, did not take into account the flexible — or at least disputed — nature of these rules. The district court ruled:

> [Hust's] actions caused him to face the difficult choice of violating a Supreme Court Rule by submitting a partially bound brief, or missing his deadline. Plaintiff chose to comply with the Su-

> preme Court Rule, and missed the filing deadline; his petition was subsequently denied as untimely by the Supreme Court. Viewing the facts in a light most favorable to plaintiff, it appears from the factual allegations and from the record on summary judgment that defendant violated plaintiff's constitutional right to access the courts.

The district judge's conclusion is incorrect.[1] The applicable Supreme Court rule neither requires *nor allows* comb-binding. The only way a comb-bound petition would be complaint with the clear text of this rule is by virtue of the impossibility clause in Rule 39.3. Reference to that rule, however, would defeat Phillips's claim that the rule is clear and provides for no exceptions. *See Allen*, 40 F.3d at 1006. Thus, there is no nexus between the denial of access to the comb-binding machine and the late filing of Phillips's petition. It was only Phillips's dogged insistence on this particular means of binding that caused his petition to be filed late and therefore rejected.[2]

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[1] We review the grant of summary judgment de novo, *Messick v. Horizon Industries, Inc.*, 62 F.3d 1227, 1229 (9th Cir. 1995).

[2] The majority contends, "Hust's refusal to allow Phillips to use the comb-binder placed him in the untenable position of having to decide whether to file the petition on the date it was due in the hopes that it would be accepted unbound or partially bound, or to

The district court's erroneous conclusion that Phillips was attempting to bind his petition in accordance with Supreme Court Rules finds no support in the record or in the text of the provisions. Accordingly, Hust's actions cannot be the proximate cause of Phillip's alleged loss.

Second, the record also reflects that the district court's analysis of the merits of the issue was permeated with incorrect presumptions for the summary judgment stage of this case. While the above-quoted analysis was performed as the first step of the *Saucier* qualified-immunity analysis, *see Saucier v. Katz*, 533 U.S. 194 (2001), the district court expressly referred back to it with a *supra* citation in concluding that summary judgment for Phillips was warranted. On the merits of plaintiff's summary judgment motion, however, it is well-established that the evidence

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wait until he could bind the petition in the hopes that it would be accepted late." Maj. Op. at 1782. While this is literally true because the rules do not guarantee under what circumstances the clerk will deem proper presentation to have been "impossible," this is simply the nature of a general standard and cannot be grounds for finding the denial of access to the courts. To do so would be to directly countermand the two explicit provisions in the Supreme Court rules that suggest leniency for *pro se* litigants. The argument also ignores that Phillips would have assumed an even *greater* risk in filing a comb-bound cert. petition when the rules explicitly require binding at the upper left-hand corner of the document.

must be viewed in a light most favorable to the nonmoving party, in this case Hust. *See T.W. Electric Service, Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630-31 (9th Cir. 1987) ([A]t the summary judgment, the judge must view the evidence in the light most favorable to the nonmoving party...[I]f a rational trier of fact might resolve the issue in favor of the nonmoving party, summary judgment must be denied. Inferences must also be drawn in the light most favorable to the nonmoving partly."). The court's analysis of the merits of the issue, however, which expressly incorporated its earlier analysis and not much more, viewed the facts in a light most favorable to plaintiff.

A *de novo* review of the record shows that Phillips failed to establish there were no disputed material issues of fact. There was not "but one reasonable conclusion as to the verdict" in this case, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986), and thus summary judgment was not appropriate.

3.

The majority's focus on the allegedly arbitrary manner in which the prison enforced its policy against allowing inmates to use the comb-punch is thus beside the point. Under *Christopher v. Harbury*, 536 U.S. at 413-14, Phillips must show that even an unreasonable prison policy was the cause of his loss. Our decision in *Gluth v. Kangas*, 951 F.2d 1504, 1508 (9th Cir. 1991), cited by the majority, does not counsel differently. There, we simply recited the unremarkable conclusion that the existence of a law library does not provide for meaningful access when inmates

are not afforded, in part because of arbitrary denials, a reasonable amount of time to use the facility. *Id.* Moreover, *Gluth* was a case decided before *Lewis* when our circuit law did not require inmates alleging "core" *Bounds* violation to establish actual injury. *Id.* at 509 n. 2; *see also Sands*, 886 F.2d at 1171.

C.

Today's holding may seem eminently reasonable to some. As the court notes, "[W]e simply reach the unexceptional conclusion that otherwise valid prison policies may not be selectively or arbitrarily enforced *in such a way as to interfere* with prisoners' access to the courts to pursue litigation arising from their incarceration." Maj. Op. at 1782 n. 2 (emphasis added). In applying such an approach, however, the majority focuses only on the apparent arbitrary nature of Hust's denial to the detriment of the causation analysis. Because I am persuaded that the majority errs in applying its own rule, and because I believe the record does not establish, at the summary judgment stage, that Hust's actions were the proximate cause of Phillips's injury, I would reverse the grant of summary judgment and remand for trial.

II.

Nor am I persuaded by the majority's view of Hust's qualified immunity claim.

A.

A state officer is not protected by qualified immunity where he or she has violated a clearly established constitutional right. Under *Saucier v. Katz*, 533 U.S. 194 (2001), "[t]he relevant, dispositive in-

quiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer his conduct was unlawful in the situation he confronted." *Id.* at 201; *see also Anderson v. Creighton*, 483 U.S. 635, 640 (1987) ("The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right."). Although the author's subjective intent is irrelevant, *id.* at 641, the information actually possessed by the officer is relevant to this determination. *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (per curiam).

The *Lewis* court made clear that the right at issue in a case such as this is not "an abstract, freestanding right to a law library or legal assistance." 518 U.S. at 2180. Instead, the right vindicated by *Bounds* was a right of "meaningful access to the courts." *Id.* Thus, the question before us is whether a reasonable prison official would believe that denying access to the prison comb-binding machine would violate an inmate's right of access to file a brief for a writ of certiorari in the Supreme Court of the Untied States.

B.

There are three key facts that establish Hust's entitlement to qualified immunity. First, despite her unfamiliarity with the explicit holding of *Lewis v. Casey*, she was clearly aware of her affirmative duty to aid inmates in the filing of legal documents.[3] She

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[3] The district court's reading of Hust's response to Phillips's interrogatory about *Lewis v. Casey* is clearly erroneous. The court found Hust to be "will-

stated that her job was not to provide legal assistance to inmates, but instead to supervise inmates in accord with ODOC Administrative Rules. Those rules provide:

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fully blind" to the applicable law when she "denied" the statement that she was "somewhat familiar with *Lewis v. Casey*, 518 U.S. 343 (1996)." That statement, when read in context, merely denies a precise knowledge of the *Lewis* case. It in no way suggests that Hust was "willfully blind" to the requirement that the basic supplies of litigation be afforded to inmates. Indeed, in the very same affidavit, Hust asserts that part of her position is to supervise inmates "in accordance with the ODOC Administrative Rules governing "*Legal Affairs (Inmate)*," which requires prison officials to make available "necessary supplies." The district court's reading is akin to requiring a state official, even one not required to be trained in the law, to be intimately familiar with the names and holdings of decided cases. We have never required as much. *See Cox v. Roskelley*, 359 F.3d 1105, 1115 n. 1 (citing *McCullough v. Wyandanch Union Free Sch. Dist.*, 187 F.3d 272, 278 (2d Cir. 1999)) ("the question is not what a lawyer would learn or intuit from researching case law, but what a reasonable person in the defendant's position should know about the constitutionality of the conduct. The unlawfulness must be apparent."). The context of Hust's statements makes clear that she was generally knowledgeable about what was required of her as a law librarian. Nothing more is required.

> Policy: Within the inherent limitations of resources and the need for facility security, safety, health and order, it is the policy of the Department of Corrections to satisfy its legal obligation to provide inmates meaningful access to the courts by affording inmates reasonable access to a law library or contract legal services, and to necessary supplies for the preparation and filing of legal documents . . . ."

Or. Admin. R. 291-139-0005. That Hust was aware of this policy requiring her to aid in the preparation of legal materials is not disputed in the record.

Second, the delay in time responding to Phillips's request was not unreasonable based upon the information known to Hust at the time. *See Anderson*, 483 U.S. at 641 (noting that the determination of whether official action is objectively legally reasonable "will often require examination of the information possessed by" the state actor). Here, the undisputed record shows that the June 13 request which Phillips sent to Hust did not indicate the date which his petition was due.

Finally, the record establishes that Hust was knowledgeable about filing requirements in courts. Hust stated in her affidavit that in her experience as a prison law librarian the courts accept *pro se* briefs without comb-binding. Her view that comb-binding was not required was reasonable, as the majority opinion itself recognizes before ultimately dismissing her interpretation of the rules as "not the only rea-

sonable interpretation." Maj. Op. at 1782. Furthermore, it is not disputed that Hust "even contacted Trent Axen, Law Librarian at the Oregon State Penitentiary (OSP) in Salem, Oregon, who has experience with this matter to confirm what [she] already knew. Mr. Axen confirmed that he does not bind inmate briefs and the court has accepted unbound inmate briefs." This type of reference to an outside, knowledgeable source is ample proof of the reasonableness of Hust's actions.

The "unlawfulness" of Hust's actions is simply not apparent. *Anderson*, 483 U.S. at 640. It was not an unreasonable reading of the rules of the Supreme Court to conclude that they do not require, nor even allow, the comb-binding of petitions. Furthermore, in light of the general tenor of *Lewis v. Casey* and our prvious cases which have held that only basic legal supplies, and not unnecessary amenities, are to be provided to inmates, *see Sands v. Lewis*, 886 F.2d at 1170, Hust's denial of access was not "willfully blind" to the requirements of law. Accordingly, it was "objectively legally reasonable," even if ultimately mistaken, *Anderson*, 483 U.S. at 641; *Act Up!/Portland v. Bagely*, 988 F.2d 868, 872 (9th Cir. 1993), for Hust to conclude that her denial of access to the comb-binding machine would not hinder Phillips's "capability" to file his petition. She is therefore entitled to qualified immunity. I respectfully dissent from the court's holding otherwise.

In The United States District Court For the District of Oregon

FRANK MARVIN PHILLIPS JR,

Plaintiff,

v.

LYNN HUST

Defendant.

Civil No. 01-1252-HA

OPINION AND ORDER

Frank Marvin Phillips, Jr.
#6199033
Snake River Correctional Institution
777 Stanton Blvd.
Ontario, OR 97914

Plaintiff, Pro se

Hardy Myers, Attorney General
Leonard W. Williamson, Assistant Attorney General
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HAGGERTY, Chief Judge.

Plaintiff, an inmate at Snake River Correctional Institution ("SRCI") who is proceeding *pro se*, brings this civil rights action pursuant to 42 U.S.C. § 1983 alleging that defendant violated the First Amendment by impeding plaintiff's rights to freely associate, communicate and correspond with others (Claim 1); by interfering with plaintiff's First and Fourteenth Amendment rights to access the courts (Claim 2); and by retaliating against plaintiff when he attempted to exercise his constitutional rights to free speech, to access the courts, and to utilize the prison grievance system (Ancillary to Claims 1 & 2; hereafter labeled "Claim 3").[1] (See Am. Compl. (#25) at 6, 12 & Pl.'s Resp. to Def.s' Concise Statement (#41) at 11-12.) Currently before the court are the following three motions filed by plaintiff: motion to compel discovery (#30); motion for summary judgment (#35); and motion for order granting sanctions (#42). Also before the court are the following two motions filed by defendants: motion for summary judgment (#32); and motion for sanctions – request for service (#44).

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[1] Because courts must liberally construe a *pro se* plaintiff's complaint, Karim-Panahi v. Los Angeles Police Dept., 839 F.2d 621, 623 (9th Cir. 1988), this court will construe the Amended Complaint as also including a § 1983 claim based on retaliation for asserting his First and Fourteenth Amendment rights to free speech, to access the courts, and to utilize the prison grievance procedures.

DISCUSSION

I. Plaintiff's Motion to Compel Discovery

Plaintiff moves to compel discovery from defendant pursuant to Fed. R. Civ. P. 37(a) and L.R. 33.3. (See Pl.'s Mot. to Compel Disc. (#30) at 1.) Specifically, plaintiff seeks "an order directing defendant to truthfully, and straightforwardly, answer Interrogatory #1 and #3." (Pl.'s Mot. To Compel Disc. at 2.) Apparently, plaintiff contends that defendant gave answers to the designated interrogatories that were evasive or incomplete, and therefore should be treated as a failure to answer. See Fed. R. Civ. P. 37(a) (3). The court notes that plaintiff attempted to resolve the discovery dispute in a letter to defendant dated March 29, 2002, prior to filing a motion to compel. (Pl.'s Mot. to Compel Disc. at 1 & Resp. to Pl.'s Mot. to Compel Disc. (#31) at Ex. 102.)

Defendant contends that the information sought by plaintiff in interrogatories No. 1 and No. 3 does not assist him in proving his claims. (Resp. to Pl.'s Mot. to Compel Disc. at 2-3.) Plaintiff's Interrogatory No. 1 reads as follows:

> Relying on documents, records or database in your possession, custody or control list your span of employment at Snake River correctional Institution (SRCI), in terms of blocks of time assigned to: (1) mixed general and law library duty; (2) general library duty; and (3) law library duty.

(Id. at Ex. 101, p. 1.) Defendant responded as follows:

> I began my employment with ODOC on June 2, 1997 as library coordinator. At that time, the law library and general library were in one location on Complex 2. When the law library was moved to Complex 3, I remained on Complex 2 to supervise the general library operation for approximately eighteen months. In June 2001, I became the law library coordinator for the law library on Complex 3 where I remain today.

(Id.) In plaintiff's March 29, 2002 letter to defendant, in which he sought a more detailed answer to Interrogatory No. 1, plaintiff explains why he is seeking the information, *i.e.*, in order to show that defendant's lack of experience as a law librarian was a factor which interfered with his access to the courts according to the standards articulated in Lewis v. Casey, 581 U.S. 343 (1996). (See Id. at Ex. 102, p. 2, & First Am. Complaint (#25) at pp. 3-4, 12-15.) Plaintiff contends in his letter that defendant's current answer to Interrogatory No. 1 fails to account for 30 months of her employment. (Resp. to Pl.'s Mot. To Compel Disc. at Ex. 102, p. 2.) The court finds that defendant's answer was sufficiently responsive; accordingly, plaintiff's motion to compel discovery with respect to Interrogatory No. 1 is denied.

Plaintiff also apparently seeks to compel defendant to give a more complete answer to Interrogatory No. 3, which reads as follows:

> Do you have any knowledge of Lewis v. Casey, 518 U.S. 343 (106), a prison law library case upon which ODOC/SRCI found authority to more tightly control the nature of the legal access function, to experiment with prisoner legal access and to even close the SRCI law library in 1997 for 1 years?

(Id. at Ex. 101, p. 2.) Defendant gave the following response: "No." (Id.) Plaintiff does not elaborate why he needs further response to this interrogatory in order to establish either of his claims, and defendant has sworn that she answered truthfully as to her knowledge of the Lewis case. Accordingly, plaintiff's motion to compel discovery with respect to Interrogatory No. 3 is denied.

II. Motions Regarding Plaintiff's Request for Sanctions

Plaintiff has moved for sanctions pursuant to L.R. 56.1, based on defendant's failure to file a separate response to plaintiff's concise statement of material facts (#36), which was filed contemporaneously with plaintiff's motion for summary judgment (#35). (Pl.'s Mot. for Order Granting Sanctions (#42) at 1-2.) Within five days of each other, defendant and plaintiff filed motions for summary judgment in this case, together with separate fact statements, supporting

memoranda and exhibits.[2] In his motion for sanctions, plaintiff requests that defendant now be barred from responding to his concise statement of material facts – since any further response would now be untimely – and that the facts set forth in plaintiff's concise statement be deemed admitted by defendant pursuant to L.R. 56.1(f). (Pl.'s Mot. for Order Granting Sanctions at 3.) The record shows that plaintiff timely filed a response to defendant's concise statement of material facts (#41), and did not simply rely on the materials submitted in support of his own motion for summary judgment.

Defendant first responded to plaintiff's motion for order granting sanctions by filing a request with the court to provide a service copy of plaintiff's motion. Defendant's request was docketed as a "Motion for Sanctions – Request for Service" (#44). According to the record, plaintiff properly filed a certificate of service (#43) together with his motion for sanctions, in which he certified that he had served a handwritten copy of the foregoing motion on defendant's attorney by placing it in the U.S. Mail drop at SRCI; however,

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[2] The record indicates that defendant's motion for summary judgment (#32), concise statement of material facts (#33), and memorandum in support (#34) were filed with this court on August 14, 2002, and that plaintiff's motion for summary judgment (#35), concise statement of material facts (#36), exhibits in support (#37), affidavit in support (#38) and memorandum in support (#30) were filed on August 19, 2002.

defendant apparently did not receive that mailing. In response to defendant's request for service of the motion for sanctions, plaintiff subsequently cured the service problem – which was apparently caused by a processing error regarding plaintiff's "inmate withdrawal request" for extra postage – by re-sending a copy of the motion to defendant's attorney. (Pl.'s Cert. of Service (#45) at 2.) Therefore, defendant's motion requesting service of plaintiff's motion for sanctions (see #44) is denied as moot.

In her response addressing the merits of plaintiff's motion for sanctions, defendant contends that no further responsive briefing is necessary because defendant is satisfied that she has adequately set forth the facts of the case in a separate concise statement of material facts and has adequately argued the applicable legal standards in her own summary judgment materials, which were filed prior to plaintiff's motion for summary judgment. (Def.'s Resp. to Pl.'s Request for Sanctions (#46) at 2-3). In reply, plaintiff argues that defendant should not be permitted to evade "mandatory pleading rules" merely because preparing a response to plaintiff's statement of facts would be inconvenient. (Pl.'s Addendum to Mot. for Order Granting Sanctions (#48) at 3.)

This court finds that although defendant is not in technical compliance with Local Rule 56.1(b), her conduct caused no prejudice to plaintiff. Defendant has not attempted to file an untimely response to plaintiff's motion for summary judgment. Accordingly, sanctions are not appropriate and will not be im-

posed. Plaintiff's motion for order granting sanctions is denied.

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III. Summary Judgment Motions

A. Introduction

As discussed above, both defendant and plaintiff have filed motions for summary judgment in this case, and both are currently before this court. See Part II, supra at p. 5, n.1 (summarizing the record of filings). Because both parties' motions are intended to address all of the claims raised in plaintiff's amended complaint, they will be treated together since, in effect, plaintiff's motion, which was filed five days after defendant's, functions as a cross-motion for summary judgment. This court advised the *pro se* plaintiff of the federal summary judgment standards on November 19, 2001 (#7). See Rand v. Rowland, 154 F.3d 952, 960-63 (9th Cir. 1998); Klingele v. Eikenberry, 849 F.2d 409, 411-12 (9th Cir. 1988) (advising *pro se* prisoner of summary judgment requirements under Fed. R. Civ. P. 56).

B. Summary of facts

It is undisputed that plaintiff, Frank Marvin Phillips, Jr., is an inmate in the custody of the Oregon Department of corrections ("ODOC") who is currently housed at SRCI in Ontario, Oregon, and that defendant, Lynn Hust, is employed by ODOC as a librarian at SRCI. (Def.'s Concise Stmt. of Mat. Facts (#33)

(hereafter "Def.'s Fact Stmt.") at 1.) It is also undisputed that plaintiff visited the SRCI law library on December 21, 2000, seeking the December 1, 2000 advance sheets of the Oregon Cases, Volume No. 48, and that the library staff could not locate the volume. (Id. at 1-2.) On that date, plaintiff typed a letter to WestGroup Publishing, Inc. ("WestGroup"), the supplier of the advance sheets, complaining about the SRCI library staff's mishandling of the subscription and seeking information about the subscription's distribution timelines. (Pl.'s Concise Stmt. of Fact (#36) (hereafter "Pl.'s Fact Stmt.") at 1 & Pl.'s Exhibit File in Support of Mot. for Summary Judg. (#37) (hereafter "Pl.'s Exhibits") at Ex. 1.)

In his letter to WestGroup, plaintiff included the introductory lines which are reproduced below:

RE: Account #BXNLSPY #8952013

In the name of:

STATE OF OREGON

Snake River Corr. Inst.

C3 Law Library

777 Stanton Blvd.

Ontario, OR 97914-8335

(Pl.'s Exhibits at Ex. 1, p. 1.) Plaintiff had also included his full name and "SRCI -- #6199033," which is his inmate identification number, together with the remainder of the prison address in the top right corner of the letter. (Id.) Plaintiff avers that he used the account number and address appearing on the face of

the "West's Oregon Case" paperbacks in order to specifically identify the subscription at issue. (Pl.'s Fact Stms. at 1; see also Pl.'s Exhibits at Ex. 8 (copy of the front cover of the Dec. 1, 2000 issue of "West's Oregon Cases").)

The record indicates that WestGroup interpreted plaintiff's December 21, 2000 letter as a request to send replacements for the "missing" volumes; on January 19, 2001, the SRCI mailroom staff forwarded a partial set of paperback "West's Oregon Cases" to defendant Hust to determine which ODOC staff member had ordered them. (Def.'s Fact Stmt. at 2 & Def.'s Mot. for Summary Judg. (#32) at Ex. 101, Hust Aff., ¶ 4) The WestGroup shipping label on the package containing the books reads precisely as follows:

FRANK MARVIN PHILLIPS JR
STATE OF OR
(503) 940-9209
SNAKE RIVER CORR INST
C3 LAW LIBRARY
777 STANTON BLVD
ONTARIO OR 97914

(Def.'s Mot. for Summary Judg. at Ex. 104, Myers Aff., Attach. 2, p. 6.) In a section apparently reserved for notes at the bottom of the label, the words "BILLING: PREPAID," and the number 008209097 appear. (Id.) Because plaintiff's inmate identification number was missing from the WestGroup address label, the address was considered incomplete by the

SRCI mailroom staff, and therefore the package was not forwarded to plaintiff.[3]

Defendant Hust then undertook an investigation regarding the WestGroup shipment to plaintiff, in which she learned from a WestGroup representative that the books had been sent based on plaintiff's December 21, 2000 letter, which staff at WestGroup had interpreted as reporting an "unreceived" order. (Id. at Ex. 101, Hust Aff., ¶ 6.) Defendant requested a copy of plaintiff's letter from WestGroup, which she received on February 2, 2001, and which she copied to her supervisor, Assistant Superintendent Carla Tupou. (Id. at ¶¶ 7-8,) Plaintiff's letter states, "I am submitting a copy of this letter to my Assistant Superintendent, Ms. Carla Tupou, who is over law libraries. . . . I want to keep her apprised of these legal access problems as they occur," and includes the lines "CC: file, Asst. Supt. Tupou, Law Library Coordinators Fendley/Rossi." (Pl.'s Exhibits at Ex. 1, p. 2.) There is a factual dispute as to whether Ms. Tupou received a copy of plaintiff's December 21, 2000 letter prior to February 2, 2001.

During her investigation regarding the WestGroup shipment to plaintiff, defendant learned that plaintiff used a typewriter in the SRCI law library to

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[3] Applicable ODOC administrative rules require a full name and address, including the inmate's state identification ("SID") number, to be placed on all inmate mail. O.A.R. 291-131-0025.

type the December 21, 2000 letter at issue. (Def.'s Mot. for Summary Judg. at Ex. 101, Hust Aff., ¶ 10.) Because SRCI law library typewriters are only authorized to be used for legal work, plaintiff's use of the typewriter for a personal business letter constituted unauthorized use of a typewriter." (Id.) Plaintiff admits to the unauthorized use of the typewriter. (Pl.'s Resp. to Def.'s Concise Stmt. at 3.)

Defendant also learned from staff at ODOC Central Trust that inmates, including plaintiff, are permitted to order books from WestGroup provided that they pay for the books prior to ordering them by completing and signing a CD28 form authorizing withdrawal of funds from the inmate's trust account. (Def.'s Mot. for Summary Judg. at Ex. 101, Hust Aff., ¶ 11.) Defendant found that plaintiff had not submitted a CD28 to Central Trust to purchase books from WestGroup, (id.) a fact which plaintiff confirms, since his letter was not sent with the intention to order any books. (Pl.'s Resp. to Def.'s Concise Stmt. at 3, and see Pl.'s Exhibits at Ex. 1 (Dec. 21, 2000 letter).) The court notes that there is no evidence in the record indicating that either plaintiff or the State of Oregon ultimately paid for the duplicate shipment of "West's Oregon Cases."

On March 19, 2001, defendant attests that she completed her investigation of plaintiff's activities, and on March 20, 2001, based on her findings, issued a misconduct report to plaintiff for "violation of Inmate Rules of Prohibited conduct, Rule 1(g) (Unauthorized Use of a Computer II); Rule 3(d) (Forgery); Rule 2(g) (Disrespect III) and Rule 2(I) (Extortion II)."

(Def.'s Mot. for Summary Judg. at Ex. 101, Hust Aff., ¶¶ 12-14.) All six of the violations alleged in the March 20, 2001 misconduct report issued by defendant are classified as "major," meaning that for each violation plaintiff could have suffered significant sanctions, including monetary fines, loss of privileges, and disciplinary segregation. See O.A.R. 291-105-0066.

However, on March 28, 2001, ODOC hearings officer Myers found that there was insufficient evidence to support the original charges alleged by Hust (defendant) in the misconduct report, and dismissed those charges, finding instead that inmate Phillips (plaintiff) was guilty only of the lesser, minor violation of rule 4(c) (Disobedience of an Order III) for unauthorized use of the law library typewriter. (Def.'s Mot. for Summary Judg. at Ex. 104, Myers Aff., ¶ 7.) As a result, plaintiff received a sanction of seven days loss of privileges, and a suspended sanction of seven days of disciplinary segregation. (Id. at ¶ 8.)

There is a dispute of fact regarding defendant Hust's motives for issuing the March 20, 2001 misconduct report to plaintiff. Plaintiff attests, in an affidavit executed on April 4, 2001, that on the previous day he attended a meeting with Assistant Superintendent Tupou, and Complex #3 Program Services manager Gilmore, who is in charge of overseeing the libraries, "to discuss ongoing impairments of the legal access function at the SRCI law library and, also, to discuss the recent issuance upon me of a Disciplinary Report (DR) for having written a letter to West's Publishing Company." (Pl.'s Exhibits at Ex. 2, ¶ 2.) Plain-

tiff further attests that during the meeting, after he expressed the opinion that the DR was filed by defendant Hust with the intention to chill his correspondence and to retaliate, Gilmore confirmed that the DR was written to discourage plaintiff from writing such letters. (Id.) However, Gilmore attests that, "I did not tell Inmate Phillips the misconduct was issued to discourage him from corresponding with WestGroup Publishing or with any person." (Def.'s Mot. for Summary Judg. at Ex. 103, Gilmore Aff., ¶ 6.) Furthermore, defendant attests that, "I did not issue the misconduct report to retaliate against Inmate Phillips for any reason. . . . I did not issue a misconduct report because Inmate Phillips corresponded with WestGroup Publishing." (Id. at Ex. 101, Hust Aff., ¶¶ 14-15.) The court notes that neither party has submitted sworn statements from Assistant Superintendent Tupou, even though she appears from the record to be a fact witness in this controversy.

The next dispute between plaintiff and defendant that is at issue this case arose over plaintiff's request to use the comb binding machine, which is apparently located in one of the SRCI libraries. According to evidence in the record, plaintiff sent an inmate communication ("kite") directed to "Ms. Rossi/Hust" on June 11, 2001, stating that "I have a brief that needs to be bound and sent soon. Please schedule me for any MORNING to briefly use the comb punch (1 hour will do)."[4] (Pl.'s Exhibits at Ex. 4 (emphasis in original).)

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[4] Plaintiff contends that he also sent a kite requesting the use of the comb binding machine on June 3, 2001, but there is no other evidence of this

In response, defendant Hust wrote on that kite that, "[w]e do not comb bind materials for inmates." (Id.) It is undisputed that defendant received this kite from plaintiff on June 13, 2001, and that she answered it on June 18, 2001 – a response time of five days. (See Id. (showing date stamps); see also Def.'s Mot. for Summary Judg. At Ex. 101, Hust Aff., ¶¶ 14-15.) It is undisputed that plaintiff had a filing deadline of June 18, 2001, for submitting a petition for a writ of certiorari to the United States Supreme Court in the matter of Phillips v. Johnson, U.S. Sup. Court Case No. 01M8, in which plaintiff sought to challenge his underlying criminal conviction. (See Pl.'s Exhibits at Exs. 5(a) & 5(b); see also Am. Compl. at 15, 17.)[5] It is undisputed that plaintiff missed his June 18, filing deadline, and that his petition was rejected by the Supreme Court as untimely. (Pl.'s Exhibits at Exs. 5(a) & 5(b); and see Def.'s Mem. in Support of Summary Judg. (#34) at 12.) It is undisputed that plaintiff's June 11, 2001 kite failed to specifically inform

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communication in the record. (Pl.'s Resp. to Def.'s concise Stmt. at 5.)

[5] Plaintiff has filed a verified amended complaint in this action. A verified complaint, which is signed and certified as true under penalty of perjury, may be used as an opposing affidavit. Schroeder v. McDonald, 55 F.3d 454, 460 (9th Cir. 1995); McElyea v. Babbit, 833 F.2d 196, 197-98 (9th Cir. 1987); see also 28 U.S.C. § 1746 (setting forth requirements for unsworn declarations).

defendant that he had a June 18, 2001 filing deadline. (Pl.'s Exhibits at Ex. 4; Def.'s Mot. for Summary Judg. at Ex. 101, Hust Aff. ¶ 27.) At issue are defendant's reasons for the apparent delay in responding to plaintiff's June 11, 2001 kite requesting use of the comb binder, and defendant's reasons for denying plaintiff access to the comb binder on June 18, 2001.

Plaintiff argues, and provides evidence to support his contention, that kites requesting access to law library materials and services are routinely processed and answered by library staff in one to two days, although the court notes that all of the kites submitted by plaintiff as evidence of this practice post-date the June 11, 2001 incident. (Pl.'s Fact Stmt. at 4; Pl.'s Exhibits at Exs. 13A-13E; Pl.'s Resp. to Def.'s Concise Stmt. at 5 & Appendices 3B-3E & 4.) Defendant attests that she answered plaintiff's June 11, 2001 kite "in the normal course," without providing any extrinsic evidence to define the "normal" time frame for responding to requests for law library access. (Def.'s Mot. For Summary Judg. at Ex. 101, Hust Aff., ¶ 27.)

Plaintiff argues, and provides evidence to demonstrate, that in October of 2000, he was permitted by SRCI law librarian Fendley to use the comb binding machine to bind a brief directed to the Oregon Supreme Court that was in excess of 144 pages. (Am. Compl. at 13; see also Pl.'s Exhibits at Ex. 6(A) – 6(D) (correspondence with counsel referring to briefs bound by plaintiff with a "comb").) Although defendant has submitted an affidavit from Fendley in support of her motion for summary judgment, it is silent on this point. (See Def.'s Mot. for Summary Judg. at

Ex. 102, Fendley Aff.) Defendant attests to the following:

> A machine for comb binding is located in SRCI Program Services for staff use. Until recently, inmate's [sic] were not authorized to comb bind their own material. . . . I knew from past experience that inmates were not authorized to comb bind their materials and the Court allowed inmates to submit briefs bound with a staple rather than a plastic comb like Inmate Phillips was requesting. Mr. [Trent] Axen [Law Librarian at the Oregon State Penitentiary] confirmed that he does not bind inmate briefs and the court has accepted unbound inmate briefs.[6]

(Id. At Ex. 101, Hust Aff., ¶ 28.) On June 18, 2001, upon learning of defendant's decision to deny him access to the comb binding machine, plaintiff sent a kite to Program Services Manager Gilmore, defendant's supervisor, with the inscription "Legal Emergency" at the top and requesting access to the comb binding machine. (Pl.'s Exhibits at Ex. 7(A).) Gilmore granted his request on June 25, 2001. (Id. at Ex. 7(B).) The

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[6] Defendant attests further that sometime during the two-week period before she executed her April 5, 2002 affidavit, "SRCI has developed a policy that allows all inmates access to the comb binding machine at cost." (Id. At p. 7, n. 13.)

court notes again that although defendant has submitted an affidavit from Gilmore in support of her motion for summary judgment, it is silent on this point. (See Def.'s Mot. For Summary Judg. at Ex. 103, Gilmore Aff.) Plaintiff attests that defendant did not allow him to enter the SRCI law library until June 29, 2001, at which time he comb punched his materials, bound his document, and filed it with the U.S. Supreme Court. (See Am. Compl. at 14 (sworn statement).)

Plaintiff attests that defendant's delay in responding to his June 11, 2001 kite, and defendant's denial of access to the comb binding machine, were unreasonable actions and were done in retaliation for plaintiff having recently prevailed in the disciplinary proceeding initiated by defendant in response to plaintiff's December 21, 2000 letter to WestGroup. (See Am. Comp. at 12-15 (sworn statement).) Plaintiff argues that as a consequence of defendant's actions, his petition for a writ of certiorari to the U.S. Supreme Court was filed late, and was subsequently denied as untimely. (See Pl.'s Mem. In Support of Mot. for Summary Judg. (#39) at 12.) Defendant attests that, "[m]y decisions regarding Inmate Phillips [sic] requests were not retaliatory nor an attempt to cause him to miss a court deadline. . . . If Inmate Phillips had indicated he had a deadline of June 18, 2001, I would have responded sooner or called him to the law library." (Def.'s Mot. for Summary Judg. at Ex. 101, Hust Aff., ¶ 33.)

Based on the above facts, plaintiff alleges three separate § 1983 claims against defendant Hust. In

Claim One, plaintiff alleges that defendant violated his First Amendment right to free speech by punishing him based on the content of his December 21, 2000 letter to WestGroup; in Claim Two, plaintiff alleges that defendant violated his rights to access the courts under the First and Fourteenth Amendments by refusing to timely allow him to comb bind a petition to the United States Supreme Court; and in Claim Three, plaintiff alleges that defendant retaliated against him for exercising his constitutional rights to free speech, to access the courts, and to utilize the prison grievance process. (See Am. Compl.) Plaintiff has sued defendant in both her personal and official capacities, and requests declaratory relief, injunctive relief, nominal damages in the amount of $1.00, compensatory damages of approximately $14,500.00, and attorney's fees and costs. (See Id. at 20-21.)

C. Summary Judgment Standards

Under Fed. R. Civ. P. 56(c), summary judgment is authorized if no genuine issue exists regarding any material fact and the moving party is entitled to judgment as a matter of law. The moving party must show an absence of an issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the moving party shows the absence of an issue of material fact, the non-moving party must go beyond the pleadings and designate specific facts showing a genuine issue for trial. Id. at 324. A scintilla of evidence, or evidence that is merely colorable or not significantly probative, does not present a genuine issue

of material fact. United Steelworkers of Am. v. Phelps Dodge Corp., 865 F. 2d 1539, 1542 (9th Cir. 1989).

The substantive law governing a claim or defense determines whether a fact is material. T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987). The court must view the inferences drawn from the facts in the light most favorable to the non-moving party. Thus, reasonable doubts about the existence of a factual issue should be resolved against the moving party. Id. at 630-31. However, when the non-moving part's claims are factually implausible, that party must come forward with more persuasive evidence than would otherwise be required. California Architectural Bldg. Prods., Inc. v. Franciscan Ceramics Inc., 818 F. 2d 1466, 1470 (9th Cir. 1987), cert. denied, 484 U.S. 1006 (1988). The Ninth Circuit has stated, "No longer can it be argued that any disagreement about a material issue of fact precludes the use of summary judgment." Id. at 1468.

D. Qualified Immunity

1. Legal standard

The defense of "qualified immunity" protects "government officials . . . from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). This rule "'provides ample protection to all but the plainly incompetent or those who knowingly violate the law.'" Burns v. Reed, 500 U.S. 478, 494-95 (1991) (quoting Malley v. Briggs, 475 U.S. 335, 341 (1986)). The Supreme

Court has set forth a two-step approach to the qualified immunity inquiry. Saucier v. Katz, 533 U.S. 194, 201 (2001). First, "[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" Id.; see also Jeffers v. Gomez, 267 F. 3d 895, 909 (9th Cir. 2001). Second, the court must "ask whether the right was clearly established." Saucier, 533 U.S. at 201. "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer his conduct was unlawful in the situation he confronted." Id. (citing Wilson v. Layne, 526 U.S. 603, 615 (1999)); see also Jeffers, 267 F. 3d at 910 (citing Browning v. Vernon, 44 F. 3d 818, 822 (9th Cir. 1995) (citing Act Up!/Portland v. Bagley, 988 F. 2d 868, 871-72 (9th Cir. 1993)).

2. Analysis

Defendant, in her motion for summary judgment, argues that plaintiff has stated two claims, and summarizes the claims as follows:

> [Claim One:] Defendant Hust violated plaintiff's First Amendment rights in interfering with his access to the courts in that on December 21, 2000 plaintiff sought the use of the December 1, 2000 advanced [sic] sheet, Volume 48 of the Oregon Cases from the law library at SRCI for research purposes on a legal matter plaintiff had pending. That volume could not be found at the library and was absent. This denial affected his

> legal research and generally plaintiff finds the defendant to be incompetent as a law librarian.
>
> [Claim Two:] Defendant Hust violated plaintiff's First Amendment rights in interfering with his access to the courts in that Hust on June 18, 2001 denied plaintiff's request to comb bind materials prepared by him. Plaintiff claims that Hust intentionally interfered with his access to the courts and denied his request in retaliation. Plaintiff's materials were comb bound and sent to the Supreme Court but were rejected as late.

(Def.'s Mem. In Support of Summary Judg. (#34) at 1-2.) Plaintiff, in his response to defendant's motion for summary judgment, correctly argues that defendant has mischaracterized the nature of plaintiff's claims. (Pl.'s Resp. to Def.'s Concise Stmt. of Fact at 11.) Plaintiff's response reiterates that Claim One alleges that defendant violated plaintiff's First Amendment free speech rights, that Claim Two alleges a violation of plaintiff's right to access the courts based on defendant's refusal to timely allow him to comb bind his brief, and that plaintiff's amended complaint alleges a "sub-theory" of retaliation for exercising his constitutional rights, which this court has labeled as Claim Three. (Id.; see also supra at p. 1, n. 1 (discussing liberal construction of *pro se* pleadings).) Defendant had the opportunity to respond to plaintiff's cross-motion for summary judgment, in which these claims were more clearly articulated and fully briefed by plaintiff,

but defendant intentionally declined to submit a response. See Part II, supra at pp. 6-7.

Plaintiff argues that defendant failed to move against the First Amendment free speech violation alleged in Claim One prior to the August 22, 2002 deadline for filing dispositive motions (see April 22, 2002, Civil Minutes (#29)), and has therefore waived her pretrial defenses to this claim. While Saucier stresses that the privilege of qualified immunity is "'an *immunity from suit* rather than a mere defense to liability . . . [which] is effectively lost if a case is erroneously permitted to go to trial,'" 533 U.S. at 200-01 (quoting Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) (emphasis in original), it would strain the bounds of common sense for this court to *sua sponte* consider a qualified immunity argument that defendant has completely failed to raise. Therefore, this court declines to find that defendant is entitled to summary judgment on the basis of qualified immunity with respect to Claim One.

With respect to Claim Three, plaintiff's retaliation claim, this court notes that plaintiff further clarified his basis for this claim, and briefed the retaliation issue at length in the memorandum in support of his cross-motion for summary judgment. (Pl.'s Mem. in Support of Summary Judg. at pp. 2, 5-6, 12-15, 19-23; see also Am. Compl. at 6, 12.) As discussed above, defendant decided to forego the opportunity to respond to plaintiff's cross-motion for summary judgment and therefore has failed to defend against Claim Three at this stage in the proceedings. See Part II, supra at pp. 6-7. Again, because defendant has completely failed

to assert that she is entitled to qualified immunity with respect to Claim Three, and because there is no requirement that the court consider the issue *sua sponte*, this court declines to find that defendant is entitled to summary judgment on the basis of qualified immunity with respect to Claim Three. Defendant has specifically argued that she is entitled to qualified immunity from liability regarding Claim Two, in which plaintiff alleges that defendant violated his First and Fourteenth Amendment rights to access the courts, on the basis that she did not violate plaintiff's clearly established constitutional rights. Accordingly, defendant's qualified immunity arguments with respect to Claim Two are addressed below.

a. Violation of a constitutional right

Prisoners have a constitutional right of access to the courts. See Lewis v. Casey, 518 U.S. 343, 346 (1996). Grounded in the First and Fourteenth Amendments, see id. at 346, this fundamental constitutional right "requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." Bounds v. Smith, 430 U.S. 817, 828 (1977); Madrid v. Gomez, 190 F. 3d 990, 995 (9th cir. 1999). "The right of access is designed to ensure that a habeas petition or a civil rights complaint of a person in state custody will reach a court for consideration." Cornett v. Donovan, 51 F.3d 894, 898 (9th Cir. 1995), cert. denied, 518 U.S. 1033 (1996); see also

Bounds, 430 U.S. at 827-28. To establish a violation of the right of access to the courts, a prisoner must establish that he or she has suffered an actual injury. Lewis, 518 U.S. at 349. An "actual injury" is "actual prejudice with respect to contemplated or existing litigation, such as the inability to meet a filing deadline or to present a claim." Id. at 348.

In this case, plaintiff has established that he was attempting to file a petition for a writ of certiorari to the U.S. Supreme Court seeking to challenge his underlying criminal conviction; therefore, the nature of the suit was that of a habeas petition, and is the type of inmate legal action intended to be protected in Lewis. 518 U.S. at 354; see also Part III.B, Summary of facts, supra at pp. 14-18. The record indicates that plaintiff was attempting to comply with the applicable Rules of the Supreme Court of the United States, which require that documents submitted to the court be stapled or bound, see Sup. Ct. R. 33.2, when he requested access to the SRCI comb binding machine. See Part III.B, Summary of facts supra at p. 15. Plaintiff's petition to the Supreme Court was in excess of 100 pages so that an ordinary staple would not suffice; additionally, the document was already partially bound with a comb binding, so that plaintiff only needed access to the binding machine to punch holes in an additional 40 pages and insert them in the existing binding. (See Pl.'s Exhibits at Ex. 7(A) pp. 2-3 (explaining circumstances).)

Plaintiff was permitted by SRCI law librarian Fendley to use the comb binding machine in October of 2000; therefore, it was reasonable for plaintiff to

expect that he would be permitted to do so again. See Part III.B, Summary of facts, supra at p. 17. Plaintiff has provided evidence that a typical response time for processing a kite requesting access to SRCI law library materials and services is one to two days. Id. at pp. 16-17. On June 11, 2001, when plaintiff sent a kite directed to "Rossi/Hust" the SRCI law librarians, it was therefore reasonable for him to expect that one of them would give him permission to use the comb binder in time to bind his petition and file it by the applicable June 18, 2001 court deadline. Id. Because defendant Hust took an atypically long five days to answer plaintiff's kite, and because Hust's decision was to deny plaintiff access to the comb binding machine on June 18, 2001, her actions caused him to face the difficult choice of violating a Supreme Court Rule by submitting a partially bound brief, or missing his filing deadline. Id. at pp. 18-19. Plaintiff chose to comply with the Supreme Court Rule, and missed the filing deadline; his petition was subsequently denied as untimely by the Supreme Court. Id. Viewing the facts in a light most favorable to plaintiff, it appears from the factual allegations and from the record on summary judgment that defendant violated plaintiff's constitutional right to access the courts. See Saucier, 533 U.S. at 201 (citation omitted).

b. Constitutional right was clearly established

The next, sequential step in the qualified immunity analysis is to determine whether the constitutional right of access to the courts was "clearly established." Id. Whether the right is clearly established in

a particular case is judged as of the date of the incident alleged, and is a pure question of law. Act Up!/Portland v. Bagley, 988 F.2d 868, 873 (9th Cir. 1993). Defendant argues that plaintiff's right to access the courts was not "clearly established," because there is no case directly on point that requires that library services provided to an inmate must include the right to comb bind a court filing. (See Def.'s Mem. in Support of Summary Judg. at 6-7.) Such specificity is not required under Saucier. 533 U.S. at 202-03. Courts may formulate a general rule, and if "certain conduct is a constitutional violation under facts not distinguishable in a fair way from the facts presented in the case at hand, the officer would not be entitled to qualified immunity based simply on the argument that courts had not agreed on one verbal formulation of the controlling standard." Id.

In this case, there is an Oregon Administrative Rule applicable to inmate legal affairs which by its plain language is directly on point:

> Policy: Within the inherent limitations of resources and the need for facility security, safety, health and order, it is the policy of the Department of Corrections to satisfy its legal obligation to provide inmates meaningful access to the courts by affording inmates reasonable access to law library or contract legal services, and to necessary supplies for the preparation and filing of legal documents with the court and parole board authorities.

O.A.R. 291-139-0005 (effective 3-13-98). The "necessary supplies" that plaintiff needed in order to prepare and file his petition with the Supreme Court, in accordance with that court's applicable Rules, included access to use the comb binding machine present and available in the SRCI law library. To deny access to the comb binding service that was essential to plaintiff's filing of a habeas corpus appeal, was to deny access to the courts under the general rule articulated in Lewis, which requires that state prisons give inmates the capability to "file nonfrivolous legal claims challenging their convictions or conditions of confinement." 518 U.S. at 356-57. This court finds as a matter of law that to deny tools or services such as comb binding to an inmate plaintiff, so as to render him incapable of substantially complying with an applicable Supreme Court Rule, is to deny access to the courts under Lewis. See Id.

In the situation defendant Hust confronted, which was a request from an inmate whom she knows to be an experienced former inmate legal assistant, (see Def.'s Fact Stmt. at Ex. 101, Hust Aff., ¶ 17) to be scheduled "soon" for access to the comb binding machine, and in the absence of a published rule to the contrary, a reasonable prison law librarian would have granted access to the comb binding machine as soon as practicable under the Lewis standard. However, the record is clear that defendant Hust was willfully blind to the applicable law; when asked by plaintiff to admit, "[t]hat you are somewhat familiar with Lewis v. Casey, 518 U.S. 343 (1996), a U.S. Supreme Court case that circumscribes the meaning of 'legal access,'" defendant, in a sworn statement exe-

cuted on March 13, 2002, denied knowledge of Lewis. (Pl.'s Exhibits at Ex. 11, pp. 2, 5.) Qualified immunity does not protect the "plainly incompetent." Saucier, 533 U.S. at 203 (citing Malley v. Briggs, 475 U.S. 335, 341 (1986).

A reasonable official in defendant's position should know that if her actions could foreseeably result in causing an inmate plaintiff to miss a court filing deadline or violate a published court rule, thereby placing his claims in jeopardy of dismissal, such actions would be unlawful under the clearly established constitutional access to court standards set forth in Lewis. A reasonable law librarian, when faced with a question as to whether to provide a particular tool, such as comb binding, to an inmate who requested its use in connection with filing a court document, would have contacted a supervisor or requested advice from an Oregon Department of Justice attorney assigned to ODOC matters. Defendant Hust took neither precaution. The record is clear that as a result of defendant's actions, plaintiff missed his June 18, 2001 filing deadline with the U.S. Supreme Court, and his petition for a writ of certiorari was denied as untimely. See Part III.B, Summary of Facts, supra at p. 18. Contrary to defendant's arguments, plaintiff has clearly satisfied the "actual injury" requirement articulated in Lewis. 518 U.S. at 349.

Finally, since plaintiff has demonstrated that he was permitted to use the SRCI machine to comb bind a brief directed to the Oregon Supreme Court in October of 2000, and since defendant has admitted that SRCI policy was changed sometime in March of 2002

to allow all inmates access to the comb binding machine, provided that they demonstrate that it is necessary to comply with a court rule and provided that they pay for the costs of utilizing the machine, there is no question that defendant's refusal to allow plaintiff to use the SRCI comb binding machine in June of 2001 was not "reasonably related to legitimate penological interests." Turner v. Safley, 482 U.S. 78 (1987). Accordingly, viewing the facts in plaintiff's favor regarding the issue of whether the law was clearly established with respect to the access to courts claim alleged in Claim Two, this court finds that defendant is not entitled to qualified immunity, and therefore denies summary judgment for defendant on this basis. Therefore, this court will examine the merits of plaintiff's three claims, since they are at issue as a result of plaintiff's cross-motion for summary judgment.

E. Merits of Plaintiff's Claims

i. Claim One – First Amendment: Free Speech

As discussed in Part D.2, supra, defendant has misinterpreted Claim One and therefore completely fails to argue whether there was a violation of plaintiff's First Amendment right to freedom of speech.[7] In

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[7] Defendant argues generally that plaintiff failed to pursue available administrative remedies with respect to Claim One, and that this alleged flaw is fatal under 42 U.S.C. § 1997e(a), Porter v. Nussle, 122 S. Ct. 983 (2002, and Booth v. Churner, 121 S.Ct. 1819 (2001). However, defendant offers no explanation or

his cross-motion for summary judgment, plaintiff attempts to set forth sufficient evidence to establish that defendant violated his free speech rights when she filed a misconduct report against him based on the content of his December 21, 2000 letter to WestGroup. See Part III.B, Summary of facts, supra at pp. 9-13; see also Pl.'s Mem. in Support of Summary Judg. at 9-11.

"[A] prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system." Pell v. Procunier, 417 U.S. 817, 822 (1974); Rizzo v. Dawson, 778 F.d 527, 532 (9th cir. 1985). "[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interest." Turner v. Safley, 482 U.S. 78 (1987). In determining whether a prison regulation is reasonably related to legitimate penological interests, the

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analysis beyond this bare legal conclusion, so that the court cannot determine whether defendant examined the record in reference to a First Amendment access to courts claim – an incorrect characterization – or in reference to free speech and retaliation claims, for which plaintiff has adequately alleged exhaustion. (See Am. Comp. at 2; see also Pl.'s Response to Def.'s Concise Stmt. at Appendices 8-11 (demonstrating steps taken by plaintiff to exhaust free speech and retaliation claims).) Therefore, the court declines to grant summary judgment for defendant on the basis of failure to exhaust Claim One and Claim Three.

court considers (1) whether there is a valid, rational connection between the regulation and a legitimate government objective which operates in a neutral fashion without regard to the content of the expression; (2) whether there are alternative means of exercising the right at issue that remain open to the prisoner; (3) the impact that the accommodation of the asserted constitutional right will have on prison staff and resources; and (4) the absence of ready alternatives that fully accommodate the prisoner's rights at *de minimus* costs to valid penological interest. Thornburgh v. Abott, 490 U.S. 401, 414-419 (1989); Turner, 482 U.S. at 89-90; Mauro v. Arpaio, 188 F.3d 1054, 1058-59 (9th Cir. 1999); Walker v. Sumner, 917 F.2d 382, 385 (9th Cir. 1990).

In this case, plaintiff has argued that when defendant filed a six-count misconduct report against him based on his December 21, 2000 letter to WestGroup, she violated his free speech rights. (See Pl.'s Memo. in Supp. Of Summary Judg. at 9-11.) However, the record indicates that defendant did not prevent plaintiff from sending the letter to WestGroup, and she did not seek to censor its content before it was sent. Rather, she filed a misconduct report against plaintiff based on an investigation that was started as an unintended consequence of the letter – WestGroup's shipment of books to plaintiff without prior authorization and without a correct address for plaintiff. See Part III.B, Summary of facts, supra at pp. 10-13. While the six original counts in defendant's misconduct report were ultimately dismissed, plaintiff was in fact found guilty of violating Rule 4(c) (Disobedience of an Order III) for unauthorized use of the law

library typewriter to type his December 21, 2000 letter to WestGroup. Id. at p. 13.

Plaintiff, as the moving party on this claim, bears the burden of demonstrating that defendant had no "legitimate penological interest" for impacting his First Amendment right to free speech. See Turner, 482 U.S. at 89-90. Because he has failed to demonstrate that the actions defendant took to enforce applicable prison regulations were not reasonably related to legitimate penological interests, he has failed to establish an essential element of Claim One; accordingly, plaintiff's cross-motion for summary judgment is denied with respect to this claim. See Celotex Corp., 477 U.S. at 22-23.

ii. Claim Two - First and Fourteenth Amendments: Access to Courts

Prisoners have a constitutional right of access to the courts. See Lewis, 518 U.S. at 346. As discussed supra, to establish a violation of the right of access to the courts plaintiff must establish that he has suffered an actual injury. Lewis, 518 U.S. at 349. An "actual injury" is "actual prejudice with respect to contemplated or existing litigation, such as the inability to meet a filing deadline or to present a claim." Id. at 348. In this case plaintiff has demonstrated that there was a clear constitutional violation under Lewis based on defendant's refusal to allow plaintiff access to the comb binding machine in the SRCI law library. See discussion supra at pp. 25-28.

Prisons must provide inmates with the capability to bring challenges to their sentences or conditions of

confinement before the courts. Lewis, 518 U.S. at 356. If a plaintiff shows that "the presentation of such a claim is currently being prevented, because this capability of filing suit has not been provided, he demonstrates that the State has failed to furnish '*adequate* law libraries or adequate assistance from persons trained in the law.'" Id. (quoting Bounds, 430 U.S. at 828) (emphasis in original). Plaintiff has provided sufficient evidence to demonstrate that defendant's refusal to comb bind his materials in accordance with the Supreme Court's Rule 33 caused him to miss his filing deadline of June 18, 2001; therefore, he has demonstrated that the assistance provided by defendant was inadequate and violated his right to access the courts by denying him the capability to timely file a petition for a writ of certiorari. See Part III.B, Summary of facts, supra at pp. 14-19. Plaintiff's petition was denied as "out-of-time," and the record shows that his lateness was not subsequently excused by the Supreme Court. (Pl.'s Exhibits at Exs. 5(A) & 5(B).) Accordingly, plaintiff's cross-motion for summary judgment with respect to Claim Two is granted; the remaining issues regarding damages shall be resolved at trial.

iii. Claim Three - Retaliation

In order to prevail on a claim of retaliation, plaintiff must allege and prove that defendants retaliated against him for exercising a constitutional right and that the retaliatory action did not advance legitimate penological goals or was not narrowly tailored to achieve such goals. Hines v. Gomez, 108 F.3d 265,

267 (9th Cir. 1997), cert. denied, 524 U.S. 936 (1998); Pratt v. Rowland, 65 F.3d 802, 806 (9th Cir. 1995).

Defendant completely fails to argue whether plaintiff has stated a retaliation claim based on defendant's conduct regarding the misconduct report and the delay and denial of access to the comb binding machine. In his cross-motion for summary judgment, plaintiff alleges that defendant's conduct caused a "chilling effect" on the exercise of his First Amendment rights to free speech and to utilize the prison grievance system. (See Pl.'s Mem. in Support of summary Judg. at 13.) Plaintiff need not demonstrate a concrete injury in order to state a retaliation claim. See Hines, 108 F.3d at 269; Resnick v. Hayes, 213 F.3d 443, 449 (9th Cir. 2000).

While the timing of defendant's conduct is sufficient to establish one element of plaintiff's retaliation claim, see Pratt, 65 F.3d at 808; and see Koch v. Lewis, 96 F.Supp.2d 949 (D. Ariz. 2000) (contemporaneous time is sufficient to show retaliation), in order to establish a *prima facie* case of retaliation, plaintiff has the burden of showing that the alleged retaliation for the exercise of his protected conduct was the "substantial" or "motivating" factor behind defendant's conduct. See Soranno's Gasco, Inc. v. Morgan, 874 F.2d 1310, 1314 (9th Cir. 1989) (quoting Mt. Healthy City Sch. Dist. Bd. Of Educ. V. Doyle, 429 U.S. 274, 287 (1977)). Plaintiff also has the burden of pleading and proving the absence of legitimate correctional goals motivating the conduct of which he complains. Pratt, 65 F.3d at 808.

As discussed supra in Part III.B, at pp. 13-14, 18-19, there are genuine issues of material fact remaining as to defendant's motivations regarding the alleged retaliatory conduct. In addition, plaintiff has not demonstrated that defendant was acting in the absence of legitimate correctional goals, which is an essential element of a retaliation claim. Accordingly, plaintiff's cross-motion for summary judgment with respect to Claim Three is denied. See Celotex Corp., 477 U.S. at 22-23.

CONCLUSION

Based on the foregoing, plaintiff's motion to compel discovery (#31) is DENIED; and plaintiff's motion for order granting sanctions (#42) is DENIED.

IT IS FURTHER ORDERED that defendant's motion for sanctions – request for service (#44) is DENIED AS MOOT; and defendant's motion for summary judgment (#32) is DENIED. Plaintiff's cross-motion for summary judgment (#35) is GRANTED IN PART AND DENIED IN PART. With respect to Claim Two, plaintiff's motion for summary judgment is GRANTED as to liability; however, the remaining issues regarding damages shall be resolved at trial. With respect to Claim One and Claim Three, plaintiff's motion for summary judgment is DENIED.

IT IS SO ORDERD.

DATED this 31 day of March, 2003.

/s/ Ancer L. Haggerty

Ancer L. Haggerty
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

FRANK MARVIN PHILLIPS JR,

Plaintiff,

v.

LYNN HUST

Defendant.

Civil No. 01-1252-HA

FINDINGS OF FACT AND CONCLUSIONS OF LAW

HAGGERTY, District Judge.

Frank Marvin Phillips, JR.
SID #6199033
Snake River Correctional Institution
777 Stanton Boulevard
Ontario, Oregon 97914-8335

Plaintiff, *Pro Se*

Leonard W. Williamson
Assistant Attorney General
Department of Justice
1162 Court Street NE
Salem, OR 97301-4096

Attorney for Defendant

HAGGERTY, District Judge.

Pro se plaintiff Frank Marvin Phillips, Jr., an inmate at the Snake River Correctional Institution ("SRCI"), brought this 42 U.S.C. § 1983 civil rights action against defendant Lynn Hust, the Law Librarian at SRCI. Plaintiff raised three grounds for relief, two of which the parties settled. The court granted plaintiff summary judgment on the third claim in which he alleged defendant violated his First Amendment right to access the courts.

On September 20, 2004, the court held a hearing to determine damages for the First Amendment violation. That hearing was conducted at the federal courthouse in Portland, Oregon. Plaintiff participated through video conferencing.

Based upon the evidence in the record and the arguments presented during the hearing, the court awards plaintiff compensatory damages in the amount of $1500.00. In addition, the court shall recommend for publication its Opinion and Order (#49) resolving the parties' cross-motions for summary judgment. The court's Findings of Fact and conclusions of Law pursuant to Fed. R. Civ. P. 52(a) are set forth below.

FINDINGS OF FACT

The court's factual findings are set out in detail in the court's Opinion and Order (#49) resolving the parties' cross-motions for summary judgment. Those findings are incorporated by reference and briefly reiterated and supplemented as follows: Defendant denied plaintiff the use of a comb-binding machine to bind his petition for writ of certiorari to the United

States Supreme Court. This delayed plaintiff's filing, leading the Supreme Court to deny certiorari because plaintiff's petition was untimely. As a result, plaintiff lost his opportunity to present his ineffective assistance of appellate counsel claim to the United States Supreme Court immediately following the conclusion of his post-conviction review proceedings in Oregon's state courts.

The court further finds that when defendant denied plaintiff access to the comb-binding machine, she did not act maliciously. Moreover, she did not act with any intentional disregard for what she believed to be the correct procedure at SRCI.

CONCLUSIONS OF LAW

Based on the previously-established First Amendment violation, plaintiff seeks recovery of $14,500 in non-economic damages, costs estimated to be between $1,000 to $4,000 and punitive damages in the amount of $1,000. As an equitable remedy, plaintiff asks the court to publish its opinion resolving the parties' cross-motions for summary judgment.

Defendant contends that plaintiff is not entitled to an award of compensatory damages because he must first demonstrate that he would have had success in his petition for certiorari. Whether the Supreme Court would have granted certiorari and further found in plaintiff's favor is both unknowable and immaterial; plaintiff's lost opportunity to present his legal claim, in and of itself, has value. "Depriving someone of an arguable (though not yet established) claim inflicts actual injury because it deprives him of

something of value – arguable claims are settled, bought, and sold." Lewis v. Casey, 518 U.S. 343, 353 n.3 (1996) (parentheses in original). The court concludes that plaintiff's ineffective assistance of appellate counsel claim which he attempted to present to the United States Supreme Court was arguable, and therefore something of value. The court determines this value to be $1500.00.

Because plaintiff is able to demonstrate an actual, compensable injury, nominal damages are not appropriate and will not be awarded. Nominal damages "are the appropriate means of 'vindicating' rights whose deprivation has not caused actual, provable injury." Memphis Cmty. Scho. Dist. v. Stachura, 477 U.S. 299, 308 n.11.

Punitive damages are appropriate in a 42 U.S.C. § 1983 action only "'when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others.'" Kennedy v. Los Angeles Police Dept., 901 F.2d 702, 707 (9th Cir. 1989) (quoting Smith v. Wade, 461 U.S. 30, 56 (1971)). Based on the court's factual determination that defendant did not act maliciously or with any intentional disregard for what she believed to be the correct procedure at SRCI, punitive damages are not appropriate and therefore will not be awarded.

Plaintiff also seeks recovery of his costs, which he estimates to be somewhere between $1,000 and $4,000. Pursuant to 42 U.S.C. § 1988, the court has the discretion to award costs to the prevailing party in a 42 U.S.C. § 1983 action. The proper time for

submitting a bill of costs is after judgment has issued. See Local Rule 54.1. Accordingly, plaintiff may submit a bill of costs which complies with the requirements of Local Rule 54.1. The court *sua sponte* extends the cost bill deadline from 14 days to 30 days from the date judgment issues.

Finally, plaintiff asks the court to publish its Opinion and Order resolving the parties' cross-motions for summary judgment. Although the court cannot order a publishing company to publish the court's decisions, it can recommend that a specific opinion be published. Because publication of the Opinion and Order would be beneficial for both inmates and correctional officers, the court grants plaintiff's request only insofar as the court shall recommend its March 31, 2003 Opinion and Order for publication.

CONCLUSION

Based on defendant's liability for the First Amendment access to courts violation, plaintiff is entitled to recover $1500.00 in compensatory damages. The court shall recommend for publication its Opinion and Order (#49) dated March 31, 2003. Judgment shall be so entered in plaintiff's favor. Within 30 days of the entry of judgment in this case, plaintiff may submit a bill of costs which complies with the requirements of Local 54.1.

DATED this 29 day of September, 2004.

/s/ Ancer L. Haggerty
Ancer L. Haggerty
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

FRANK MARVIN PHILLIPS JR,

Plaintiff,

v.

LYNN HUST

Defendant.

Civil No. 01-1252-HA

JUDGMENT

Based on the Opinion and Order (#49) dated March 31, 2003, and the Findings of Fact and Conclusions of Law (#91) dated this day, judgment is hereby entered in favor of plaintiff Frank Marvin Phillips, Jr. and against defendant Lynn Hust in the amount of $1500.00. Pending motions, if any, are DENIED AS MOOT.

DATED this 29 day of September, 2004.

/s/ Ancer L. Haggerty
Ancer L. Haggerty
United States District Judge

KW 6/2

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(3)

No. 07-897

IN THE SUPREME COURT OF THE UNITED STATES

LYNN HUST,

Petitioner,

v.

FRANK MARVIN PHILLIPS, JR.,

Respondent.

DECLARATION OF PRIOR FILING OF MOTION FOR LEAVE TO PROCEED In Forma Pauperis

DECLARATION (RE: In Forma Pauperis)

I, Frank Marvin Phillips, Jr., hereby declare that I filed a Motion to Proceed In Forma Pauperis and related Declaration of Indigency with this Court, by U.S. Mail, on February 7, 2008.

I hereby declare under penalty of perjury that the foregoing is correct and true. 28 USC 1746.

Dated this 30th day of May, 2008.

Frank M. Phillips Jr.

Frank Marvin Phillips, Jr.
Respondent

RECEIVED
JUN 02 2008
APPELLATE DIVISION
SALEM, OR 97301

COPY

In the Supreme Court of the United States

Lynn Hust,

Petitioner,

No. 07-897

v.

Frank Marvin Phillips, Jr.

Respondent.

Declaration of Filing

On May 30, 2008, I placed the ORIGINAL of (Respondent's) opposition to Petition for Writ of Certiorari in a sealed envelope, first-class postage prepaid, addressed to Clerk of Court, U.S. Supreme Court, Washington, DC 20543-0001, and delivered said envelope into the hands of M.C.C.F. staff member Deputy Douglas for placement in the U.S. Mail on this date at M.C.C.F., 4000 Aumsville Hwy. S.E., Salem, OR 97317-9112.

I declare under penalty of perjury that the foregoing is correct and true. 28 USC 1746.

Executed: May 30, 2008

Frank M. Phillips, Jr.
FRANK M. PHILLIPS, JR. PRO SE
M.C.C.F. -- #6199033
4000 Aumsville Hwy. S.E.
Salem, OR 97317-9112

COPY

In the Supreme Court of the United States

Lynn Hunt,

Petitioner,

No. 07-897

v.

Frank Marvin Phillips, Jr.

Respondent,

Declaration of Service

On May 30, 2008, I placed a TRUE COPY of the (Respondent's) opposition to Petition for Writ of Certiorari in a sealed envelope, first-class postage prepaid, addressed to Mary Williams, Solicitor General, 1162 Court St. N.E., Salem, OR 97301, and delivered said envelope into the hands of M.C.C.F. staff member Deputy Douglas for placement in the U.S. Mail on this date at M.C.C.F., 4000 Aumsville Hwy. S.E., Salem, OR. 97317-9112.

I hereby declare under penalty of perjury that the foregoing is correct and true. 28 USC 1746.

Executed: May 30, 2008

Frank M. Phillips Jr.

FRANK M. PHILLIPS, JR. PRO SE

M.C.C.F. -- #6199033

4000 Aumsville Hwy. S.E.

Salem, OR 97317-9112

COPY

No. 07-897

IN THE SUPREME COURT OF THE UNITED STATES

LYNN HUST,

Petitioner,

V.

FRANK MARVIN PHILLIPS, JR.,

Respondent.

(Respondent's) OPPOSITION TO

PETITION FOR WRIT OF CERTIORARI

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

*FRANK MARVIN PHILLIPS
Respondent PRO SE

M.C.C.F. -- Sid. 6199033
4000 Aumsville Hwy. S.E.
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SALEM, OR 97301

COPY

CROSS-QUESTION PRESENTED

May the Petitioner (Hust) continually fail/refuse/neglect to present a full accounting of the pleadings below, some of which show that her concerns raised in this Court, as well as those raised in the Ninth Circuit, below, were asked, answered, and disposed of by the U.S. District Judge when he filed an Order which, at Hust's request, "clarified" whether or not the Judge had ordered "Comb binding" as a mandatory, or even preferred, method of binding prisoner briefs for prisoners in the Oregon Department of Corrections, when the Judge emphatically stated that he stated no such thing, and Hust pleads her case without ever owning up to the existence of the District Judge's clarification?

[Basis for Question, defined:

U.S. District Court Judge Ancer Haggerty's Opinion and Order of March 31, 2003 (CR #49) was published as Phillips v. Hust, 338 F.Supp 2d. 1148 (D. Or.) in December of 2004. Phillips v. Hust does not accurately or fully represent the court's final holding in the District Court case.. That is, the court's Opinion and Order was clarified in a subsequent Order at the request of the Petitioner (Hust) in her Motion for Reconsideration or Clarification dated April 29, 2003 (CR #50). Judge Haggerty's ORDER of Clarification was filed by the court on February 9, 2004 (CR #60). That Order amended the prior Opinion and Order **in substance and Petitioner Hust has never owned up to that fact.**

FOR THE THIRD TIME, Respondent (Phillips) submits that which Hust refuses to acknowledge, i.e., Judge Haggerty's ORDER (in Clarification), here, at **APP. 1-11.**

Had Hust submitted the **whole record necessary for her appeal in the 9the Circuit, there would be no issue for her appeal and, thus, no matter for this Court.** If there was error in these proceedings, it came in one of two ways:

(1) the District Court may have erred in not submitting his "Clarification" along with the Opinion and Order (which it clarified in substance) when he sent the material to the publisher of the Federal Supplement Reporter; OR

(2) the 9th Circuit erred in not Ordering Judge Haggerty to do so (i.e., recall or modify 338 F.Supp. 2d 1148 to conform to his actual **and final adjudication** on the "legal access" claim.]

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

NOTE: "Opposition" to Petition for Writ of Certiorari is a MISNOMER. Respondent feels, indeed, that this case should be set before this Court and decided, but not on the grounds that the Petitioner raises, as those grounds present a false representation of the District Court proceedings; disregard and disrespect the adjudication by Judge Ancer Haggerty; undermine respondent's legitimate concerns; and corrupts the public view of legal proceedings.

OPINIONS BELOW

Respondent agrees with the Petitioner's characterization of the OPINIONS BELOW except that, once again, the Petitioner (HUST) has refused to tell the whole prior-litigation story, i.e, to wit:

Phillips v. Hust, 338 F.Supp. 2d 1148 (D. Or. 2003) was reported; it is reproduced for this court at Petitioner's App. 41-76; and it does establish that the Distict Court granted plaintiff's motion for summary judgment as to liability on "Phillips'" access-to-courts claim. THAT SUMMARY-JUDGMENT OPINION WAS CLARIFIED ON THE MOTION OF DEFENDANT (Hust) AND "HELD" CONTRARY TO PETITIONER'S MISREPRESENTATION OF THE CONTROVERSY HERE. Respondent hereby presents the Clarification of the Summary Judgment decision at App. 1-11.

STATEMENT OF JURISDICTION

Respondent accepts petitioner's Statement of Jurisdiction.

CONSTITUTIONAL PROVISIONS INVOLVED

Respondent accepts petitioner's Constitutional Provisions Involved.

STATUTORY PROVISIONS INVOLVED

Respondent accepts petitioner's Statutory Provisions Involved.

INTRODUCTION

The Ninth Circuit held that (1) a prison librarian violated a prisoner's constitutional right of access to courts when she denied the prisoner's request to use the law library's comb-binding machine to bind a petition for certiorari, **comb-binding having been the prison's chosen method of binding large works, and the prison having offerred no other form of binding to the prisoner** (the law librarian was overruled, subsequently, by her boss, who ordered the necessary binding although such was untimely for the court); and (2) the librarian is not entitled to qualified immunity from damages because a reasonable prison official in her position would know that denying the prisoner's request to comb-bind his petition, **as the prison offerred no other form of binding to the prisoner**, violated clearly established law. According to the Ninth Circuit, the librarian is liable because the prosoner's failure to file a timely petition was foreseeable.

Not only was the librarian's refusal to provide **brief-binding of any kind or any description** the proximate cause of the prisoner's failure to meet his Supreme Court deadline, it was more that foreseeable (i.e, a prima facie matter) that an other-than-loose-leaf petition could not be timely filed under the conditions imposed on the prisoner by the librarian.

Moreover, **THIS CASE HAS UNNECESSARILY PROCEEDED ALL THE WAY TO THE U.S. SUPREME COURT ON A FALSE PREMISE REPEATEDLY ENDORSED BY THE PETITIONER WHO HAS NO QUALMS IN DECEIVING THE COURTS.**

STATEMENT OF THE CASE

I. Factual background

Respondent, for the purpose of simplicity, agrees that the Petitioner's "Factual background" section is a fair statement, for the purposes of this stage of activity in this Court.

II. The Ninth Circuit's decision

Again, Respondent agrees, at this time, with Petitioner's recital in this section entitled "The Ninth Circuit's decision," except for one qualifier. To wit:

When Hust denied "comb-binding" at Snake River Correctional Institution, she had, in fact, denied any form of binding whatsoever. Hust relied on her theory that she could force the inmate to submit a brief to the U.S. Supreme Court, or any court, in an unbound form and the receiving court would simply have to deal with it. In short, she felt no regard for rules of court that seek to accomplish organized pleadings via some form of binding.

It would seem that this Court, out of some deference to the District Court Judge's ruling should, at least, hear/read that which he had to say when Hust asked the court if the state institutions must now supply comb-binding. Judge Haggerty said:

> "Defendant [Hust] contends that this court interpreted the Rlule 33.2 requirement that submissions be 'stapled or bound' to mean that, as a matter of law, the defendant should have allowed the plaintiff to comb bind his materials because comb binding was mandated by this rule. (See Def.'s Mot. for Recons. at 1.) Defendant further argues that Rule 33.2 does not require materials submitted to the U.S. Supreme Court to be comb bound, and seeks reconsideration or clarification of the March 31, 2003 Opinion and Order because she believes that the court's holding rested on this point, so that Oregon Department ofCorrections ("ODOC") staff members 'now

run the risk of civil suit if they do not provide spiral plastic binding (comb binding) for inmate briefs headed to the U.S. Supreme Court.' (Id. at 5.) **Defendant is incorrect.** [Emphasis added]

"This court previously found that defendant was willfully blind to the applicable Supreme Court authority defining her duty to provide prisoners with access to the courts; therefore, this court declined to grant her motion for summary judgment on the basis of qualified immunity because the doctrine does not protect the actions of an unreasonable official, or the official who is 'plainly incompetent.' (See Op. and Order at 33-34, citing Saucier b. Katz, 533 U.S. 194, 203 (2001).). I **held that** [emphasis supplied]:

"'[a] reasonable official in defendant's position should know that if her actions could foreseeably result in causing an inmate plaintiff to miss a court filing deadline or violate a published court rule, thereby placing his claims in jeopardy of dismissal, such actions would beunlawful under the clearly established constitutional access to court standards set forth in Lewis [v. Casey 518 U.S. 343 (1996)], A reasonable law librarian, when faced with a question as to whether to provide a particular tool, **such as [emphasis added]** comb binding, to an inmate who requested its use in connection with filing a court document, would have contacted a supervisor or requested advice from an Oregon Department of Justice attorney assigned to ODOC matters. Defendant Hust took neither precaution.'

"Id. at 34).

"The facts in this case led me to conclude that denying plaintiff access to the comb binding machine amounted to a denial of access to the courts under the general rule articulated in Lewis v. Casey, 518 U.S. 343, 356-57 (1996). (See Op. and Order at 32-33.) **Specifically, I found as a matter of law that 'to deny tools or services SUCH AS** [such as was italicized by Judge Haggerty] **comb binding to an inmate plaintiff, so as to render him incapable of substantially complying with an applicable Supreme Court Rule, is to deny access to the courts under Lewis"** (ID. at 33 (emphasis added).) **I DID NOT REST MY FINDING ON A INTERPRETATION THAT RULE 33.2 REQUIRES THE COMB BINDING OF PRO SE PETITIONS IN GENERAL; RATHER, IT WAS BASED ON DEFENDANT'S FAILURE TO TAKE REASONABLE STEPS TO FACILITATE PLAINTIFF"S ACCESS TO** the Supreme Court by providing available binding tools or services when the plain language of the applicable U.S. Supreme Court **RULE REQUIRES SOME FORM OF BINDING** [Bold and caps, supplied].

> "The record on summary judgment did not show that the Snake River Correctional Institution's law library had a stapling apparatus capable of inserting a staple in the upper left-hand corner of a document that exceeded one hundred pages in length, that inmates would be premitted to use this apparatus, or that some other form of binding would be offered to inmates to permit them to comply with Rule 33.2. Plaintiff demonstrated that his document was too large to be secured by an ordinary staple; **in his case**, comb binding was shown to be the necessary, available, and reasonable alternative. **This holding does not require ODOC staff members to provide comb binding for every inmate brief that is directed to the U.S. Supreme Court**, and it is consistent with the plain language of the applicable state regulation, O.A.R. 291-139-0005, which sets forth the ODOC policy that inmates will be provided with 'necessary supplies for the preparation and filing of legal documents with the court.' (See Op. and Order at 32.). [Bold added]"

ORDER (of Clarification) District Court Docket #60, pages 6-8.

III. 9th Circuit's dissenting opinion; and

IV. 9th Circuit's dissent from denial of rehearing en banc:

The dissenters on both occasions were duped by petitioner Hust into believing that District Court Judge Haggerty had held that comb binding was both mandatory and necessary, when, in truth, he said nothing of the kind. The Judge held that **some form of binding was necessary** and he had but merely noticed that the prison, on numerous occasions, **had chosen** to meet that binding obligation with comb-binding. Thus, the dissenter's focus on comb-binding renders their opinions irrelevant to the legal-access claim, matter decided below, and unworthy of serious consideration. **Petitioner Hust's success in duping several judges on the Federal Bench must end here.**

REASON FOR GRANTING LIMITED REVIEW (i.e., to summarily remand for correction of District Court Record)

(See next page)

I. History of Hust's False Premise and Related Court Proceedings

Since February 9, 2004, based on her initial false premise, Petitioner Hust has frivolously dragged this case through two full-fledged rounds in the 9th Circuit and is now inviting this Court to become voluntarily snookered.

On March 31, 2003, U.S. District Court Juge Ancer Haggerty issued an Opinion and Order (C.R. #49) which granted summary judgment in favor of Respondent Phillips on his legal-access claim. Hust immediately filed, on April 29, 2003, her Motion for Reconsideration or Clarification (C.R. #50) of Judge Haggerty's Opinion. Therein, Hust raised concerns which became her later claims in the 9th Circuit. On February 9, 2004, Judge Haggerty issued an Order of Clarifecation (C.R. #60) in which he answered Hust's concerns. The clarification also had the effect of **amending in substance** the original Opinion and Order of 3-31-03. That document, C.R. #49, is the basis for the Judgment that Hust took on appeal. (See Pet. for Writ, at App. 82: "JUDGMENT *** Based on the Opinion and Order (#49) dated March 31, 2003 ***, judgment is hereby entered in favor of plaintiff ...."). **It is nothing short of unscrupulous to attack a judgment that the appellant FULL-WELL KNOWS has been modified by a subsequent Order of clarification, and not recognize the existence of the "Clarification." YET, THAT IS EXACTLY WHAT HUST HAS DONE IN THIS SET OF APPELLATE PROCEEDINGS.**

***[Judge Haggerty's Clarification of the Basis for the Judgment is found herein at App. 1-11] ***

Unfortunately, and lacking any mention of its modification/clarification, Judge Haggerty's Opinion and Order of 3-31-2003 became Phillips v. Hust, 338 F.Supp. 2d 1148 (D. OR., Pub. 12-2004). (See Findings of Fact and Conclusions of Law at Pet. for Writ of Cert at App. 77-81 [i.e., C.R. #91]:

> "Finally, plaintiff asks the court to publish its Opinion and Order [i.e., C.R. #49] resolving the parties cross-motions for summary judgment. ***. Because publication of the Opinion and Order would be beneficial for both inmates and correctional officers, the court grants plaintiff's request only insofar as the court shall recommend its March 31, 2003 Opinion and Order for publication."

At Pet. for Writ of Cert, App. 81.

In his recommendation to publish his summary judgment holding, Judge Haggerty failed to include (C.R. #60) his clarification along with (C.R. #49) his Opinion and Order of 3-31-2003. Thus, neither the Opinion and Order of 3-31-03 nor Phillips v. Hust accurately or fully represent Judge Haggerty's **final holding** in the District Court. And, as aforementioned, the Judgment under attack states that it relies on that very basis, C.R. #49 (Opinion and Order of 3-31-2003). Therefore, absent the "Clarification" Order (C.R. #60, Feb. 9, 2004), Petitioner Hust knows that she is not presenting to the appellate courts, or to this Court, the true nature of the District Court's holding wherein he specifically stated: "I did not rest my finding on a [sic] interpretation that that Rule 33.2 requires the comb binding of pro se petitions...." (See, here, last line of App. 7 and first line of App. 8). That statement is a part of the District Court's holding, yet petitioner Hust evades it.

Petitioner has good reason to leave-out mention of the district court's clarification; **it destroys her case**. In he petition for Writ of Certiorari, no doubt tongue in cheek, petitioner endlessly hammers on he legal falsity that comb binding was held to be mandatory, in which case the 9th Circuit erred in affirming, and that, in any event, Respondent Phillips had other methods in which to bind his Supreme Court documents. All her contentions are farces: (1) the "Clarification" establishes that comb binding was not held mandatory by the district court; and (#2) the Clarification established (a), the law library at SRCI had no "stapling apparatus capable of inserting a staple in the upper left-hand corner of a document that exceeded one hundred pages in lenght," (App. 8, middle of page) and (b) the "plaintiff cemonstrated that his document was too large to be secured by an ordinary staple, in his case[.]" Ibid. Moreover, as petitioner would cringe to admit, the trial judge was thorough in commenting that Respondent Phillips, **under his circumstances**, had no binding options available, and that point was made and not disputed in the district court proceeding:

> "Plaintiff points out that within the prison facility, items such as rubber bands, loose staples, metal rings, string, and other potential binding materials, are all considered contraband; a voluminous document must be bound in the prison law library, or not at all. (See Plaintiff's Response to Defendannt's Motion for Reconsideration at 2)." (Clarification Order, App.6, FN #1).

It doesn't take a wizard, then, to comprehend that no staples, plus no comb-binding, equals a refusal to bind Respondent Phillips' brief in **some form** as required by Rule 33.2, at SRCI.

This, now, is the **third** time that Respondent Phillips has had to submit the Clarification of the Opinion and Order (which is the

basis for the Judgment, as to the legal-access claim). See ORDER (of clarification) App. 1-11, attached. Aslo see, Request for Sanction, App 12-16, attached, where Respondent complained of the Petitioner's evading the clarification in the first round in the 9th Circuit; and see pages 13-24, following, which addresses the second time petition Phillips had to supply the clarification to the 9th Circuit, because Hust, yet again, persisted in evading the "modification of judgment" that is the whole purpose of the Clarification ORDER (App. 1-11).

II. THE LAW OF THE CASE

The law of the case in district court consists of the Opinion and Order (C.R. #49) and the ORDER clarifying the Opinion and Order (C.R. #60). The JUDGMENT which petitiner Hust took on appeal to the 9th Circuit was based on the Opinion and Order (C.R. #49) and it said so. But, that Judgment cannot rest on the Opinion and Order (C.R. #49) alone without creating a legal dilemma which corrupts (in Hust's favor) the entire 9th Circuit proceedings; i.e., the Judgment does not coincide with the law of the case. Petitioner Hust seized on that mishap and instead of complaining that the distric court erred in entering a flawed judgment, she knowingly appealed the flawed judgment, citing error to the trial court **which was negated by the trial court in his clarification** (C.R. #60). It atartling that the 9th Circuit, both the majority and the dissenters, has not rebelled against Hust's sleight-of-hand. It should be clear to any court reviewing this case that the JUDGMENT is incomplete absent the ORDER of Clarification of the Opinion and Order of which the Judgment relies.

III. Respondent's Best Argument in Explaining the Genesis of the Horribly Twisted Case

Respondent could offer in this Court no better argument than that which he set out in the 9th Circuit. Thus, he adopts and repeats the text of his APPELLEE'S ANSWERE TO APPELLANT'S [HUST'S] PETITION FOR PANEL REHEARING OR FOR REHEARING EN BANC. (See section entitled, post, "ADOPTED TEXT"). The text consumes 11 pages and, because petitioner Hust's false premise has not changed in, or since the 9th Circuit case, Respondent's opposition to that false premise has neither changed.

Of extreme significance in doing the above, respondent is currently a prisoner in a county jail awaiting a new trial after 15 years, asn as for the law library here, it is egregiously ill-equipped for defending or pursuing federa action of any kind. Thus, because the text is accurate, relevant and on-point, the text below makes a reasonable substitute for that which could not be produced here.

Accordingly, respondent simply asks that this Court gives the respondent a chance, and Judge Haggerty a chance, by overlooking that the below text had been directed to the 9th Circuit. **That the text is worthy of consideration is a given, as respondent prevailed on that pleading in the 9th Circuit.**

Petitioner's "game" is not without precedent. The legitimacy of some allegations against former-president Clinton hinged, he believed, on the meaning of the word "is." Here, petitioner's difficulty with being candid in this Court, as well as that same failure in the 9th Circuit, is that she seems unable to understand the

phrase "such as." Judge Haggerty did not mandate comb binding. Instead, and to the contrary, he enforced an obligation on ODOC to provide "tools and services **such as** comb binding" to accomplish **some form** of rule-compliant binding. If this Court can decipher "such as," as petitioner seems able to do, this case will be summarily remanded for a corrected JUDGMENT which includes reference to the ORDER of Clarification (C.R. #60), in which the District Court Judge, emphatically states that he **Did Not** find comb-binding to be mandatory in this case, or in any Oregon case.

CONCLUSION

Summary remand should occur whereby the Judgment, below, is CORRECTED to include the full extent of the District Court's holding.

MAY 30, 2008.

Respectfully submitted,

Frank M. Phillips Jr.

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Phillips V. Hust, 04-36021 (9th Cir) 1

APPELLEE'S ANSWER TO APPELLANT'S PETITION FOR PANEL REHEARING OR FOR REHEARING *EN BANC*

A. [ADOPTED TEXT]

The foolishness of this appeal (as to the comb-binding issue), and the defendant's request for one type of re-review after another, must now come to an end. U.S. District Court Judge Ancer Haggerty has been thrashed and bashed by defendant's counsel Wasserman for what, absent Mr. Wasserman's misrepresentations, is no greater error than Judge Haggerty's failure to publish an important ORDER along with his opinion which became Phillips v. Hust, 338 F.Supp.2d 1148 (2004). (See APPENDIX 1-11: **ORDER** [CR #60] of Feb. 9, 2004, in response to Hust's motion for reconsideration or clarification [CR #50]of District Court's opinion and Order [CR #49] of March 31, 2003).

This Court would work a harsh disservice on Judge Haggerty were it to fail to read Judge Haggerty's astute ORDER (App. 1-11) and, in the resultant informational vacuum, reverse his well-reasoned decision and/or allow rehearing in this court of a matter asked by defendant, and answered by Judge Haggerty, in the proceedings below.[1] There really was no "comb-binding" issue to be appealed.

1 "Comb-binding" concerns as to Judge Haggerty's opinion should be limited to the fact that the Judge's ORDER of 2/9/04, addressing the defendant's imagined confusion as to the court's holding, should have been made a part of the published decision. The remedy, then, should be an order requiring the District Court to so amend its published decision to include the order.

April 2, 2007
04-36021

B. This is the second time that Hust's counsel has failed to direct the 9th Circuit to Judge Haggerty's (Supplemental) ORDER. (See App. 1-11).

In this appeal, plaintiff-appellee had to do a Supplemental Excerpt of Record because, *inter alia*, Hust neglected to file with this court both Judge Haggerty's important ORDER (on request for Clarification of his opinion) and the transcript of the V-NET damages trial, both vital to determining the truth of what occurred in the proceedings below.[2]

Here, the omission of Judge Haggerty's Order intentionally neglects the fact that Judge Haggerty went to some length, at the request of Hust, to explain that **he never held that comb-binding was mandated by any court rule** and **that he did not even suggest that comb-binding was a good choice for SRCI to make in attempting to meet binding necessities.** At most, Judge Haggerty made it very clear that, **since SRCI had chosen comb-binding as its strategy for binding large briefs**, it was incumbent on SRCI staff to use that which they provide. This whole appeal is a not-too- subtle attempt to white-wash the repercussions of Hust's actions in refusing to provide ANY type of binding, including the type which SRCI had provided in the past for huge briefs, i.e., comb-binding. Hust, in this request for rehearing is, again, attempting to bamboozle this court.

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2 Plaintiff sought sanctions against Hust in this appeal because plaintiff believed, and believes, that defendant's omissions of crucial document(s) are neither inadvertent nor for reason that the document(s) has/have no relevance. Plaintiff, thus, believes that the failure to address Judge Haggerty's (Supplemental) ORDER, in particular, is nothing short of misconduct on the part of Hust's counsel.

C. Hust's counsel has invented an issue for appeal that does not exist in the record.

Hust complains that comb-binding is not required by Supreme Court Rule (see Appellant's Brief and Appellant's Petition for Rehearing, cited throughout). That rhetorical "complaint" only becomes a viable complaint *IF* the U.S. District Court ***HELD*** that comb-binding was required. Judge Haggerty advanced nothing of the sort. Instead, he advised the parties:

> "I found that defendant was not entitled to qualified immunity because she was willfully blind to the applicable law requiring her to furnish plaintiff with the tools or services to give him the capability to access the courts, and because she failed to respond to plaintiff's request to bind his brief in a manner that a reasonable official in her position would have responded. ([Opinion] at 33-34)." App. 2 (Order of 2/9/04).

The Order did not rule that comb-binding was mandatory (although he did, justifiably, infer that some form of binding was mandatory). Neither is there mention of a required comb-binding. It was for SRCI to decide the method in which it provided the legal-access binding required on briefs. It is indisputable, from the record, that SRCI had chosen to use comb-binding to bind huge briefs. Judge Haggerty did not make that choice; and, prisoners at SRCI have no control over what SRCI selects as a binding strategy on large briefs. Prisoners can only seek that which prison policy has installed as the proper method; that method, **SRCI promulgated**, was comb-binding.

Judge Haggerty did not stutter; he squarely **DID NOT** require comb-binding:

> "***. I ruled that defendant violated plaintiff's constitutional right to access the courts because, as a matter of law, the denial of **available** tools or services to bind his brief rendered plaintiff substantially incapable of complying with the applicable Supreme Court rule. 9[Opinion] at 39-40)." App. 2 (Order of 2/9/04). (Emphasis added).

Judge Haggerty did not critique the suitability of SRCI's chosen method of binding large briefs, which *had been* comb-binding. The Court did not come in on this case at the time that SRCI was deciding what to use for binding large briefs, nor at a time when no method of binding large briefs did not even exist at SRCI. Instead, Judge Haggerty came into the case after SRCI already had an established track record of comb-binding large briefs. There was never a question before the judge as to whether or not SRCI's choice was a wise one or, even, a sufficient type of binding. Hust seems to be angry with herself, and SRCI, for chosing comb-binding in the first place. That's a type of invited error.

Judge Haggerty left the question for the future as to whether comb-binding was an adequate method of delivering brief-binding services. The majority, here, did the same. **The constitutional violation alleged, and proven, is the LACK of binding, not the TYPE of binding.** Hust provided no **timely** binding at all. Hust, not surprisingly, completely fails to address the possibility that SRCI's choice of comb-binding as a method of binding large briefs may not adequately satisfy the Supreme Court's preference as to form of binding. Instead, she endeavors to blame the whole situation on plaintiff, the U.S. District Court and this majority decision.

Thus, Hust's counsel's argument is not with "outsiders" but with the law library staff and others at SRCI. Plaintiff did not choose the style of binding-- the SRCI staff did. Thus, Hust convinces us that that choice may be a poor one.[3]

Judge Haggerty explicitly set himself apart from any hint that comb-binding might be required by Supreme Court Rule 32.2: [sic, 33.2]

> "Defendant contends that this court interpreted the Rule 32.2 [sic, 33.2] requirement that submissions be 'stapled or bound' to mean that, as a matter of law, the defendant should have allowed the plaintiff to comb bind his materials because comb binding was mandated by this rule. (See Def's Mot. for Recons. at 1). [S]he believes that the court's holding rested on this point, so that Oregon Department of Corrections ("ODOC") staff members 'now run the risk of civil suit if they do not provide spiral plastic binding (comb binding) for inmate briefs headed to the U.S. Supreme Court.' ([Def's Mot. for Recons.] at 5). **Defendant is incorrect.**" (App. 6; Order of 2/9/04; Emphasis added).

Settling the matter, in concrete terms, Judge Haggerty wrote, **using *italics*, emphasizing the phrase "*such as*":**

> "This court previously found that defendant was willfully blind to the applicable Supreme Court authority [e.g., Lewis v. Casey] defining her duty to provide prisoners with access to the courts[.]
>
> "The facts of this case led me to conclude that denying plaintiff access to the comb binding machine amounted to denial of access to the courts under the general rule articulated in Lewis v. Casey, 518 U.S. 343, 356-57 (1996). (See Op. and Order at 32-33). Specifically, I found as a matter of law that 'to deny tools or services ***SUCH AS*** comb binding to an inmate plaintiff, so as to render him incapable

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3 Banking on success in this appeal, SRCI **has not, still,** chosen a method other than comb-binding for large briefs going to any court. Thus, another potential calamity lurks at SRCI for the next prisoner in need of large-brief binding.

> of substantially complying with an applicable Supreme Court Rule, is to deny access to the courts under Lewis.' (Id. at 33 (emphasis added).) **I did not rest my finding on a** [sic] **interpretation that Rule 32.2 requires the comb binding of *pro se* petitions in general**; rather, it was based on defendant's failure to take reasonable steps to facilitate plaintiff's access to the U.S. Supreme Court by providing available binding tools or services when **the plain language** of the applicable U.S. Supreme Court rule requires **some form of binding**." (App. 8; Bold supplied; italics and parentheses in original).

D. If Judge Haggerty's ORDER does not prevent rehearing, then, the Judge may as well be reversed, so he may, again, declare that comb-binding is not required by U.S. Supreme Court rule, and that, accordingly, he did not base his decision on that premise.

It appears that the defendant's concerns would be rendered moot, as to comb binding confusion if, in the course of the remand for further damages findings (ordered by the majority in this Court), the District Court is also advised to include its Order [CR #60] (i.e., App. 1-11) in its final Opinion, resolving the case without fanfare. Neither the panel's decision in this Court, nor the District Court decision, requires any further legal findings and neither does either decision, read in light of the (Supplemental) ORDER, offend any of the U.S. Supreme Court cases controlling legal access questions (as complained of by defendant).

E. The District Court opinion AND ITS CLARIFICATION is the Law of Case.

Judge Haggerty's ORDER of 2/9/04 is a substantial element of the law of the case in the action below. The defendant's questions/concerns, as to whether comb

binding is required by Rule 33.2, were actually litigated via defendant's Motion for Reconsideration/Clarification; were controverted by plaintiff's Response thereto; and, were resolved by Judge Haggerty's ORDER of 2/9/04, wherein he explicitly set forth that, No, "I did not rest my finding on an [sic] interpretation that Rule 33. requires the comb-binding of *pro se* petitions in general[.]" (App. 7-8).

If, as a matter of *res judicata* or law of the case, someone asked whether the District Court held that comb-binding was required by Rule 33.2, the answer is profoundly, "No." Hust has attempted to lure, first, the 9th Circuit panel, and now the 9th Circuit En Banc, into an inside-out long-winded discussion as to whether the District Court in Portland was incorrect to hold that comb-binding was rule-bound, i.e., mandatory. **Hust and her counsel will have to find a different ruling to appeal**, because Judge Haggerty **did not hold** that comb binding was mandatory or, even, a wise method of binding. The court simply, and correctly, found that the record showed that SRCI had chosen comb-binding as the method to bind huge briefs in the past and, in the absence of any evidence that SRCI had developed another method for binding huge briefs, comb binding remained **SRCI's choice** of strategy for binding huge briefs[4].

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4 Hust, it seems, seeks a preliminary ruling (a critique) spelling out that this court feels that SRCI's choice of binding is not in compliance with court binding-rules and, thus, that SRCI (Hust) has no obligation to provide that mistaken choice of binding. In fact, Hust asks this court to enter into an advisory situation, a micro-managing situation, where it would tell SRCI what is, and what isn't, appropriate as binding strategy. Courts are not generally authorized to gate-keep on state decisions in order to prevent civil suit. If comb-binding is a bad choice,

F E. **SRCI staff left Department of Justice hanging out to dry.**

Ex-law librarian Hust and her cohorts do/did not always operate in conformance with the desires of state's counsel. Counsel Wasserman is not happy that SRCI both chose comb binding as a method for binding huge briefs and, then, Hust got into trouble for refusing to provide that very service when called upon to do so. No doubt, Counsel Wasserman is not enthusiastic about this Court learning that SRCI, still, has adopted no policy or mechanism for binding large briefs other than comb binding. Moreover, no decision has been made, by SRCI staff, as to what would better suit Rule 33.2, or any other court rule on brief preparation. That leaves Hust's counsel hanging out to dry. Counsel must face the facts that SRCI, not plaintiff, nor Judge Haggerty, chose comb binding; that SRCI still has no other method of binding large briefs; that, even during this litigation, SRCI has not stepped-up to provide a better method of meeting binding needs; and that this whole appellate "game" has been to whitewash Hust's acts and to pass the buck in regard to who is responsible for **UNTIMELY** binding plaintiff's brief. The ultimate clincher, if one is needed, is that the boss over law libraries, Program Service Manager Judy Gilmore, and Hust's cohorts foil Hust's main contentions and doom

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that is a question for another day, another case, alleging a different form of rights violation. Here, the question is whether or not Hust's refusal to supply **timely** binding, of any sort, is a violation of legal access. If comb-binding had been provided, and the U.S. Supreme Court had rejected that form of binding, then, the claim against SRCI (Hust) would focus on the mistaken choice of **type** of binding that SRCI provides. That potential problem never developed and this Court should not enter into that unnecessary inquiry.

the request for rehearing. (See Appellant's Petition for Rehearing ["Pet. Rehrg."] at p. 4, appellant citing to record and Gilmore's order to comb-bind).

The record shows that Gilmore and other SRCI library staff have utilized comb binding as a better-than-nothing form of binding. By denying binding, even the less-than-perfect comb binding, Hust acted both outside of her obligations; without SRCI approval; and, in fact, in disobedience of established policy. Hust's counsel admits:

> "The panel majority **correctly** recognized that, as interpreted in Lewis, Lindquist, and other cases, the constitutional right of access to the courts require prison officials to supply inmates with '**some means** of preparing documents that comply with the rules of court' in which a case is pending. Slip Op. at 1780)." Pet. Rehrg. at 8, Emphasis added.

Hust's counsel is angry that SRCI chose comb binding as the poor, but ONLY, method for preparing huge briefs, and he would rather SRCI staff not bind at all, i.e., that was the course that Hust took; but, that decision was not supported by Hust's superior, Gilmore. It was Hust's conduct that created the missed deadline and, thus, the constitutional violation. Gilmore had no qualms over providing binding, even if that binding turned out to be comb binding. (*see* Pet. Rehrg. at 4).

For example, had plaintiff clairvoyantly felt the necessity to kite Gilmore rather than defendant Hust, the record in this case exhibits that Gilmore would have **timely** authorized binding. Contrarily, rather than contact her boss (Gilmore), Hust denied the binding request, only to have her boss overrule her. Thus, the

problem here is Hust, not the SRCI policy of utilizing comb binding as a method of fulfilling binding needs. (See FN 4, *supra*)[5].

CONCLUSION

In light of the District Court ORDER (*see* App. 1-11), the appellant cannot rationally lay claim to any of the requisite purposes that would support in *En Banc* rehearing as set out in FRAP 35 (a) or (b). The District Court opinion and the majority decision in this court conflict with no other decisions of this court and the facetious "comb-binding" claim presented for rehearing is of no importance to anybody, or any court, except for defendant Hust. It was Hust's employer, SRCI, that established the use of comb binding at SRCI and Hust cannot appeal her farcical claim that Judge Haggerty had declared (directly or implicitly) that comb binding was mandatory under S.Ct. Rule 33.2 because **he actually ruled to the contrary**. (*See* ORDER at App. 1-11).

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5 Hust's counsel is attempting to bait this court into the hyper-technical analysis of what type of brief binding will make the U.S. Supreme Court smile the widest, when the question is much more simple: Does SRCI's policy choice of comb-binding come closer to satisfying briefing rules than sending 244-plus pages to the Supreme Court loose-leaf? And, in any event, unlike **plastic spiral binding**, counsel Wasserman has not exhibited a single particle of evidence that any court has ever rejected comb-binding as a fulfillment of a binding requirement.

(huge difference)

Therefore, no rehearing of any sort should be granted and, at most, an order might be directed to the district court to include its order (App 1-ll) in its final decision, as a part of the remand proceeding for damages findings, *inter alia*.

(Also see, Section "A" at p. 1, *supra*, and FN 1, *supra*).

Respectfully submitted,

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Certified 2/9/04

[C.R. #60] APP. 1

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

FRANK MARVIN PHILLIPS, JR.	)	
	)	Civil No. 01-1252-HA
Plaintiff,	)	
	)	
v.	)	
	)	ORDER [of clarification]
LYNN HUST	)	
	)	
Defendant.	)	

HAGGERTY, Chief Judge.

PROCEDURAL BACKGROUND

Plaintiff, who is proceeding *pro se*, brings this civil rights action pursuant to 42 U.S.C. § 1983 alleging that the defendant, Lynn Hust, violated the First Amendment by impeding his rights to freely associate, communicate and correspond with others (Claim One); by interfering with his First and Fourteenth Amendment rights to access the courts (Claim Two); and by

#60

APP. 2

retaliating against him when he attempted to exercise his constitutional rights to free speech, to access the courts, and to utilize the prison grievance system (Claim Three). (See Am. Compl. (#25) at 6; see also Pl.'s Resp. to Def.'s Concise Statement (#41) at 11-12.) Currently before the court is defendant's motion for reconsideration or clarification (#50) of this court's Opinion and Order of March 31, 2003 (#49) as to Claim Two.

In my prior Opinion and Order, I denied defendant's motion for summary judgment and granted in part plaintiff's cross-motion for summary judgment with respect to Claim Two. (Op. and Order (#49) at 43.) I found that defendant was not entitled to qualified immunity because she was willfully blind to the applicable law requiring her to furnish plaintiff with the tools or services to give him the capability to access the courts, and because she failed to respond to plaintiff's request to bind his brief in a manner that a reasonable official in her position would have responded. (Id. at 33-34.) On the merits of Claim Two, I ruled that defendant violated plaintiff's constitutional right to access the courts because, as a matter of law, the denial of available tools or services to bind his brief rendered plaintiff substantially incapable of complying with the applicable Supreme Court Rule. (Id. at 39-40.) The remaining issues regarding plaintiff's damages were reserved for trial.

APP. 3

(See id. at 40.)

I have reviewed the memoranda submitted by the parties, and conclude that defendant has failed to show any reason that would justify relief upon reconsideration. Accordingly, I reaffirm my Opinion and Order of March 31, 2003. For the reasons set forth below, defendant's motion for reconsideration (#50) is denied; and defendant's alternative motion for clarification is granted to the extent that this order contains further discussion of this court's prior rulings regarding Claim Two.

APPLICABLE LEGAL STANDARD

"A district court may reconsider its grant of summary judgment under either Federal Rule of Civil Procedure 59(e) (motion to alter or amend a judgment) or Rule 60(b) (relief from judgment)." School Dist. No. 1J, Multnomah County, Oregon v. ACandS, Inc., 5 F.3d 1255, 1262 (9th Cir. 1993) cert. denied, 512 U.S. 1236 (1994); see also Fuller v. M.G. Jewelry, 950 F.2d 1437, 1441-42 (9th Cir. 1991) (where moving party did not indicate which Federal Rule of Civil Procedure governed the motion, a motion for reconsideration of summary judgment was appropriately brought under either Rule 59(e) or Rule 60(b)). Under either theory, a motion for reconsideration is committed to the discretion of the trial court. School Dist. No. 1J, 5 F.3d at 1262.

Defendant did not specify which Federal Rule of Civil

Procedure she intends to apply to her motion for reconsideration. However, because defendant's motion was filed more than ten days after the challenged summary judgment rulings were entered, so that the motion would be untimely under Rule 59(e), this court will apply the standards used to evaluate a motion for reconsideration brought pursuant to Rule 60(b). Provided that a Rule 60(b) motion is made "within a reasonable time," a court may relieve a party from a final judgment or order if that party can establish one of the following grounds:

> (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud . . . misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged . . . or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

Fed. R. Civ. P. 60(b); see also School Dist. No. 1J, 5 F.3d at 1263 (applying Rule 60(b) grounds for relief to motions to reconsider summary judgment determinations).

DISCUSSION

Defendant moves this court to reconsider its Opinion and Order denying her motion for summary judgment on the basis of qualified immunity, and granting plaintiff's cross-motion for summary judgment as to liability regarding Claim Two. Defendant argues that plaintiff's inmate communication ("kite") lacked essential details and that those omissions impeded her, as they

would any other reasonable corrections officer, from timely and effectively responding to his request to use the comb punch machine. Defendant also argues that even if she had known the destination of plaintiff's brief, U.S. Supreme Court Rule 33.2 (hereafter "Rule 33.2") may not reasonably be read to require that an inmate's briefs be comb bound. In the alternative, she contends that *pro se* litigants are not strictly bound to the technical requirements of Rule 33.2, and that in fact the U.S. Supreme Court disfavors and discourages comb binding. (See Def.'s Mot. for Recons. (#50) at 4 & Ex. 107, Aff. of Brenda Coughennower, ¶¶ 7-9.) Lastly, Defendant seeks clarification of this court's interpretation of Rule 33.2.

Plaintiff argues that this court neither inferred, found, nor stated that comb binding was specifically mandated by Rule 33.2. He contends that Claim Two is not about the specifics of how a brief might be bound; instead, it is about whether a state actor provided adequate access to the courts given the circumstances of his case. (See Pl.'s Resp. to Def.'s Mot. for Recons. (#52) at 1-2.) Plaintiff argues that this court did not err in its finding that defendant behaved unreasonably in her response to his request for access to available law library services in order to comply with an applicable U.S. Supreme Court rule.[1] (See id. at 2-3.) Lastly, plaintiff argues that

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[1]Plaintiff points out that within the prison facility, items such as rubber bands, loose staples, metal rings, string, and

APP. 6

defendant's current motion attempts to introduce new information in an affidavit that could have been obtained prior to this court's summary judgment rulings; therefore, the evidence is untimely and not admissible to satisfy the requirements of Rule 60(b)(2). (See Pl.'s Resp. to Def.'s Mot. for Recons. at 8.)

I. Extraordinary Circumstances to Justify Reconsideration

Defendant contends that this court interpreted the Rule 33.2 requirement that submissions be "stapled or bound" to mean that, as a matter of law, the defendant should have allowed the plaintiff to comb bind his materials because comb binding was mandated by this rule. (See Def.'s Mot. for Recons. at 1.) Defendant further argues that Rule 33.2 does not require materials submitted to the U.S. Supreme Court to be comb bound, and seeks reconsideration or clarification of the March 31, 2003 Opinion and Order because she believes that the court's holding rested on this point, so that Oregon Department of Corrections ("ODOC") staff members "now run the risk of civil suit if they do not provide spiral plastic binding (comb binding) for inmate briefs headed to the U.S. Supreme Court." (Id. at 5.) Defendant is incorrect.

This court previously found that defendant was willfully blind to the applicable Supreme Court authority defining her duty

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other potential binding materials, are all considered contraband; a voluminous document must be bound in the prison law library, or not at all. (See Pl.'s Resp. to Def.'s Mot. for Recons. at 2.)

APP. 7

to provide prisoners with access to the courts; therefore, this court declined to grant her motion for summary judgment on the basis of qualified immunity because the doctrine does not protect the actions of an unreasonable official, or the official who is "plainly incompetent." (See Op. and Order at 33-34, citing Saucier v. Katz, 533 U.S. 194, 203 (2001).) I held that:

> "[a] reasonable official in defendant's position should know that if her actions could foreseeably result in causing an inmate plaintiff to miss a court filing deadline or violate a published court rule, thereby placing his claims in jeopardy of dismissal, such actions would be unlawful under the clearly established constitutional access to court standards set forth in Lewis. A reasonable law librarian, when faced with a question as to whether to provide a particular tool, such as comb binding, to an inmate who requested its use in connection with filing a court document, would have contacted a supervisor or requested advice from an Oregon Department of Justice attorney assigned to ODOC matters. Defendant Hust took neither precaution."

(Id. at 34).

The facts in this case led me to conclude that denying plaintiff access to the comb binding machine amounted to a denial of access to the courts under the general rule articulated in Lewis v. Casey, 518 U.S. 343, 356-57 (1996). (See Op. and Order at 32-33.) Specifically, I found as a matter of law that "to deny tools or services *such as* comb binding to an inmate plaintiff, so as to render him incapable of substantially complying with an applicable Supreme Court Rule, is to deny access to the courts under Lewis." (Id. at 33 (emphasis added).) I did not rest my finding on a interpretation that Rule 33.2 *italicized, emphasized*

APP. 8

requires the comb binding of *pro se* petitions in general; rather, it was based on defendant's failure to take reasonable steps to facilitate plaintiff's access to the U.S. Supreme Court by providing available binding tools or services when the plain language of the applicable U.S. Supreme Court rule requires some form of binding.

The record on summary judgment did not show that the Snake River Correctional Institution's law library had a stapling apparatus capable of inserting a staple in the upper left-hand corner of a document that exceeded one hundred pages in length, that inmates would be permitted to use this apparatus, or that some other form of binding would be offered to inmates to permit them to comply with Rule 33.2. Plaintiff demonstrated that his document was too large to by secured by an ordinary staple; in his case, comb binding was shown to be the necessary, available, and reasonable alternative. This holding does not require ODOC staff members to provide comb binding for every inmate brief that is directed to the U.S. Supreme Court, and it is consistent with the plain language of the applicable state regulation, O.A.R. 291-139-0005, which sets forth the ODOC policy that inmates will be provided with "necessary supplies for the preparation and filing of legal documents with the court." (See Op. and Order at 32.) Accordingly, defendant has not demonstrated "extraordinary

circumstances" which would justify relief pursuant to Rule 60(b)(6). See Fuller, 950 F.2d 1442; see also Backlund v. Barnhart, 778 F.2d 1386, 1388 (9th Cir. 1985).

II. Newly Submitted Evidence

Defendant has submitted a new affidavit in her motion for reconsideration which suggests that Rule 33.2 does not require materials to be comb bound, and that the U.S. Supreme Court disfavors comb binding. (See Def.'s Mot. for Recons. at Ex. 107, Aff. of Brenda Coughennower.) To support a motion for reconsideration which seeks to overturn a summary judgment ruling based upon newly discovered evidence, the moving party is obliged to show not only that this evidence was newly discovered or unknown to it until after the ruling on the motion, but also that it could not with reasonable diligence have discovered and produced such evidence at the time the motion for summary judgment was filed. See Engelhard Industries, Inc. v. Research Instrumental Corp., 324 F.2d 347, 352 (9th Cir. 1963), cert. denied, 377 U.S. 923 (1964); see also School Dist. No. 1J, 5 F.3d at 1263 ("The overwhelming weight of authority is that the failure to file documents in an original motion or opposition does not turn the late filed documents into 'newly discovered evidence.'") (citations omitted). If the proffered evidence was available before the disposition of the motion for summary

judgment, then as a matter of law the moving party is not entitled to reconsideration based upon that evidence. Trentacosta v. Frontier Pac. Aircraft Industries, 813 F.2d 1553, 1557-58 n. 4 (9th Cir. 1987).

The information contained within Coughennower's affidavit could have been discovered with reasonable diligence and produced at the time the defendant's motion for summary judgment was filed, or in response to the plaintiff's cross-motion for summary judgment.[2] Defendant offers no reason why the Coughennower affidavit could not have been obtained prior to this court's ruling on the motions for summary judgment; therefore, as a matter of law, defendant is not entitled to reconsideration pursuant to Rule 60(b)(2) based on this evidence. See Trentacosta, 813 F.2d at 1557-58 n. 4 (9th Cir. 1987)

CONCLUSION

Based on the foregoing, defendant has failed to establish any Rule 60(b) grounds to justify relief upon reconsideration of this court's March 31, 2003 Opinion and Order denying defendant's

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[2]I note also that the statements attributed Mr. Jeff Atkins, Supervisor of the Case Analyst Division of the U.S. Supreme Court, in support of defendant's interpretation and suggested application of Rule 33.2, are hearsay evidence contained within the Coughennower affidavit because they are out-of-court statements, made by someone other than the affiant, offered to prove the truth of the matter asserted. See Fed. R. Evid. 801. Atkins's statements are not admissible absent a showing that they fall into a recognized exception to the hearsay rule; besides being untimely, these statements should have been presented in an affidavit executed by Atkins. See generally, Fed. R. Evid. 802 - 807.

APP. 11

motion for summary judgment and granting in part plaintiff's cross-motion for summary judgment regarding Claim Two. Accordingly, I reaffirm my original Opinion and Order of March 31, 2003. Defendant's motion for reconsideration (#50) is DENIED; defendant's alternative motion for clarification (#50) is GRANTED to the extent that this order contains further discussion regarding Claim Two.

IT IS SO ORDERED.

DATED this _9___ day of February, 2004.

_____/s/Ancer L.Haggerty_
Ancer L. Haggerty
United States District Judge

APP. 12

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRANK MARVIN PHILLIPS, JR.	)	
	)	(U. S. Dist. No. 01-1252-HA)
Plaintiff-Appellee,	)	
	)	**CASE NO. 04-36021**
vs.	)	
	)	REQUEST FOR SANCTIONS
LYNN HUST, Snake River Corr.	)	
Inst. Staff,	)	
	)	
Defendant-Appellant.	)	

In a prior Motion for Extension of Time, appellee complained that appellant had failed to provided required documents in this case which were dispositive of of the issues she raised on appeal; and, that she had worked a type of fraud upon this court. This Court placed the matter before the panel assigned to decide the case as a Request For Judicial Notice. (See Order of March 16, 2005). Appellee feels that additional evidence of bad-faith pleadings by appellant, disclosed below, should be included in the request for judicial notice; and, sanctions should be imposed on appellant. Appellee moves therefor.

Distorted/Misleading Pleading by Defendant/Appellant

Covered in the Appellee's Answering Brief, but helpful as a reminded here, appellant stated at p.16 of her opening brief:

Certified True Copy
5/31/05
Frank Phillips

APP. 13

> "The district court's ruling rests on the **Court's belief** that the Supreme Court's rules require petitions for certiorari submitted in forma pauperis to be comb bound. See Cr 49 at 29-30; ER 96-97." (Op Br 16; Emphasis added).

The court held no such "belief." The assertion is a lie, patently false. See CR 60; Supp ER 15-25. (Also see, Section II, Appellee's Br at 9: "THE DISTRICT COURT DID NOT HOLD THAT COMB BINDING WAS SPECIFICALLY MANDATED BY RULE"). The only way the appellant would dare to make such an assertion was to deprive this court of the district court's "clarification", CR 60, discussed in the "Request for Judicial Notice" already on file. (Appellee provided the document, CR 60, at Supp ER 15-25). The matter of concern, now, is the manner of citation used by appellant to support the erroneous conclusion, above, about the court's "belief." She cites to "CR 49 at 29-30; E.R. 96-97" as authority. But, nothing whatsoever on those pages would lead to such a wild-eyed, erroneous assertion. And, the appellant's false claim was no mistake, for she again asserted:

> "A review of the controlling Supreme rules shows that the premise for the district court ruling---that the Supreme Court's rules require comb binding---is simply wrong. Accordingly, there is no basis for the district court's decision." (Op Br 17; emphasis added).

There is no such district court ruling, nor premise, and appellant cannot support those fabrications. (See Order & Op. CR 49; ER 68-110; and Order (of clarification) CR 60; Supp ER 15-25). Sanctions should be granted and appeal dismissed.

Exacerbating the fraud, the appellant falsified a citation, to lend support to to her false allegations of error which she attributes to the judge, i.e., the so-called "belief," "premise," and "ruling," supra, to wit:

> "see C.R. 49 at 32-33; E.R. 99-100("comb binding *** was essential to plaintiff's filing"; "to deny *** comb binding to an inmate plaintiff, so as to render him incapable of substantially complying with an applicable Supreme Court Rule")." Op Br 17, lns. 1-4.

It is indisputable that appellant intended, through that citation, to persuade this court to buy into the falsity, i.e., that Judge Haggerty believed in, relied on, and ruled in favor of some imaginary mandate that comb binding, specifically, was required. To give this court a clear impression of what appellant tried to pull off, the entire citation, from which appellant pulled her few words, is reproduced here, disclosing the treachery (Appellant's few words are emphasized):

> "The 'necessary supplies' plaintiff needed in order to prepare and file his petition with the Supreme Court, in accordance with that Court's applicable Rules, included access to use the comb binding machine [punch] present and available in the SRCI law library. To deny access to the **comb binding** service that **was essential to plaintiff's filing** of habeas corpus appeal, was to deny access to the courts under the general rule articulated in Lewis, which requires that state prisons give inmates the capability to 'file nonfrivolous claims challenging their convictions or conditions of confinement.' 518 US at 356-57. This court finds as a matter of law that **to deny** tools or services such as **comb binding to an inmate plaintiff, so as to render him incapable of substantially complying with an applicable Supreme Court Rule,** is to deny access to the courts under Lewis. See id." (CR 49 at 32-33; ER 99-100).

The dearth of words pulled from that long paragraph by appellant, striped of context, exhibits an abuse of the citation process to the nth degree. Whereas the judge was focused on the defendant's unlawful act of denying "tool or services **such as** comb binding" (emphasis supplied), appellant changed the context into a "ruling" that is said to have specifically mandated comb binding.

Far from mandating comb binding, the court found that SRCI had chosen comb binding as one way to comply with court rules and, he found that that service was both "present and available in the SRCI law library." Supra. The court chastised defendant ONLY because she refused to dispense the existing comb-binding service. In the judge's clarification (CR 60; Supp ER 15-25), he cited specifically to the last five lines of the paragraph that is in controversy (above), and he emphasized, in italics, the words "**such as**" (CR 60 at 7; Supp ER 21), so as to prevent the very distortion that appellant tried to pull off in this appeal, i.e., some false notion that comb binding was specifically mandated. **In short, if the appellant can get this court to buy into that distortion, she wins her appeal.**

The better part of appellant's arguments in her brief are long-winded repeats of the contentions she raised in her Def's Motion for Reconsideration/Clarification (CR 50) and answered in the "Clarification" (CR 60; Supp ER 15-25). It appears

that this appeal is a sham in that appellant evaded the clarification and its dispositive nature.[1] The combination of leaving out the trial transcript, evading the "Clarification" by not providing it to this Court, and the distortion of citations, should sufficiently show that the appellant did not plead in good faith.

Respectfully submitted,

Frank M. P. Phillips Jr.

Frank Marvin Phillips, Jr.
Appellee Pro Se

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1 It is not surprising, to this party, that state's counsel corrupted the pleadings in this case. State's counsels seems to think that they can take advantage of prisoner litigants and that either (#1) the prisoner does not detect the intentional "defects" or, (#2) the prisoner will be unable to get the court's attention and will fail to persuade the court that the "defects" are excusable.

In Phillips v. Maass, (88-4218; 9th Cir. 1988), a federal habeas corpus case, state's counsel confused the record so well in district court that the trial judge fell victim to the state's assertion that petitioner had not exhausted his claims and she dismissed. All it would have taken was a look at the State Public Defender's brief, and the Pro Se Supplemental Brief, to determine what had been raised in the state proceedings and exhausted. On appeal, here, appellant was able to untangle the record and the state quickly conceded: "[P]etitioner must be deemed to have satisfied the exhaustion requirement and to be entitled to a determination by the district court of the merits of his claims." Brief of the Appellee, p.5. The state then recommended, "[T]he judgment of the district court should be reversed, and the case should be remanded for further proceedings." Ibid. First, the state mislead the district court judge, and then, the state blamed **her** for committing error.

In this case, the state tried to put words in Judge Haggerty's mouth, and then, based on those fabrications, tried to blame the judge for committing error. This court should sternly reprimand appellant for this misconduct.

Supreme Court, U.S.
FILED
JUL 07 2008
OFFICE OF THE CLERK

No. 07-897

IN THE

Supreme Court of the United States

LYNN HUST,

Petitioner,

v.

FRANK MARVIN PHILLIPS, JR.,

Respondent.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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TABLE OF CONTENTS

Page

A. Nothing in Hust's certiorari petition suggests that the district court concluded that comb-binding was required. 2

B. Nothing suggests that the Ninth Circuit was "deceived" or "duped" into believing that the district court ruled that comb binding was required. 3

C. In urging the Ninth Circuit to reverse, Hust accurately described the judgment that the district court entered, and she accurately explained why the order denying her motion to reconsider was immaterial. 4

D. The district court order denying Hust's motion to reconsider did not "destroy[] her case." 7

CONCLUSION 9

SUPPLEMENTAL APPENDIX

Pages 14-19 from petitioner Hust's Appellant's Brief in the Ninth Circuit ..... Supp. App. 1

Pages 1-4 from Hust's Reply Brief in the Ninth Circuit ..... Supp. App. 8

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

In this case, both the district court and Ninth Circuit concluded that petitioner Hust—a prison librarian—violated respondent Phillips' right to access the courts, by refusing to let him use the prison comb binder to bind a petition he wished to file in this Court. The district court and Ninth Circuit also concluded that Hust is not entitled to qualified immunity. The Ninth Circuit explained that Hust is liable because, after she denied Phillips' request to use the comb binder, Phillips failed to submit his petition to this Court until the pertinent deadline had passed. In the Ninth Circuit's view, Hust is liable because that result was "foreseeable," even if this Court's rules did not require Phillips' petition to be bound. The Ninth Circuit erred by holding that mere "foreseeability" creates liability, and by requiring no showing that Hust's conduct *caused* Phillips' inability to obtain relief in this Court. In holding that foreseeability alone sufficed, the Ninth Circuit parted ways with other circuits' access-to-courts jurisprudence, it ignored this Court's qualified-immunity jurisprudence, and it significantly expanded prison officials' potential liability in a variety of contexts. Accordingly, this court should grant Hust's petition for the purpose of summarily reversing (or, alternatively, should set the case for briefing and argument).

In response, Phillips asserts that "[t]his case has unnecessarily proceeded all the way to the United States Supreme Court on a false premise." (Response

3, 6). According to Phillips, petitioner Hust has attempted to "deceiv[e]" both this Court and the Ninth Circuit by asserting that the district court concluded that Supreme Court rules *required* comb binding. (Response 3, 6). As Phillips points out, the district court ultimately explained—in denying Hust's motion to reconsider the order deeming her liable—that, in its view, "the applicable United States Supreme Court rule requires *some* form of binding," and it declined to hold "that Rule 33.2 *requires* the comb binding of pro se petitions in general." (Response App. 8; emphasis added).

Yet nothing in Hust's certiorari petition is based on the "false premise" that Phillips refers to. Nothing in Hust's petition suggests that the district court concluded that Supreme Court rules require comb binding. Further, nothing in the Ninth Circuit decision that Hust asks this Court to review suggests that the Ninth Circuit misunderstood the nature of the district court ruling. Indeed, Hust made no effort to mislead the Ninth Circuit about the district court ruling. Finally, and despite Phillips' contentions to the contrary, nothing in the district court order denying Hust's motion to reconsider provides any basis for denying Hust's certiorari petition.

A. Nothing in Hust's certiorari petition suggests that the district court concluded that comb-binding was required.

Hust's certiorari petition notes that the district court ultimately "denied Hust's motion for summary judgment, granted Phillips's motion for summary judgment as to liability on the denial-of-access [to

courts] claim, and denied it as to his other claims." (Petition 5). The petition does not describe the district court's reasoning in making those rulings. It does not purport to identify the manner in which the district court construed this Court's rules. Although the petition argues that the district court should have granted Hust's summary judgment motion, it nowhere suggests that the district court construed the Court's rules as requiring comb-binding.

In short, although Phillips suggests that Hust's petition "endlessly hammers on the legal falsity that comb binding was held to be mandatory" by the district court, nothing in the petition suggests that the district court deemed comb binding "to be mandatory." As a result, Phillips' "false premise" argument is itself based on a false factual premise.

B. Nothing suggests that the Ninth Circuit was "deceived" or "duped" into believing that the district court ruled that comb binding was required.

Although Phillips accuses Hust of "deceiving the courts," and of having "duped" the dissenters in the Ninth Circuit "into believing that [the] District Court . . . had held that comb binding was both mandatory and necessary," nothing supports those assertions. First, nothing in the Ninth Circuit's written decision, or in its order denying Hust's petition for rehearing, suggested that the district court believed that Supreme Court rules require comb binding. (Petition, App. 2-26). Second, neither Judge O'Scannlain's dissent (to the decision affirming the district court judgment) nor Judge Kozinski's dissent (to the order

denying the petition for rehearing) reflects a belief that the district court had deemed comb binding "mandatory." (Petition, App. 3, 26-40). Nothing suggests that either the majority or the dissenters had been "duped" about the nature of the district court ruling.

C. In urging the Ninth Circuit to reverse, Hust accurately described the judgment that the district court entered, and she accurately explained why the order denying her motion to reconsider was immaterial.

Phillips does accurately describe one aspect of Hust's Ninth Circuit briefing: In Hust's appellant's brief in the Ninth Circuit, she did state that "the premise for the district court's ruling" was its conclusion "that the Supreme Court's rules require comb binding." (Supp. App. 5, Appellant's Brief 17). Hust made no reference—in that particular brief—to the district court order denying her motion to reconsider, or to the district court's clarification that, in its view, Supreme Court rules merely required "some" form of binding. Yet Hust's brief accurately described the judgment that the district court ultimately had entered, and it did not attempt to somehow deceive the Ninth Circuit.

Hust's appellant's brief asked the Ninth Circuit to reverse the district court judgment. That judgment did appear to reflect a belief by the district court that Supreme Court rules required Phillips' petition to be comb bound. The district court judgment—dated September 29, 2004—stated that it was "[b]ased on the Opinion and Order (#49) dated March 31, 2003."

(Petition, App. 82). In turn, the March 31, 2003 Opinion and Order suggested that Supreme Court Rule 33 required Phillips to comb bind his petition. (*See* Petition, App. 74, March 2003 Opinion and Order, referring to Hust's "refusal to comb bind [Phillips'] materials in accordance with the Supreme Court's Rule 33"). As a result, Hust's appellant's brief in the Ninth Circuit accurately described the premise of the district court judgment as its belief that "the Supreme Court's rules require comb binding."

And while the district court had retreated from that premise in the February 9, 2004 order that denied Hust's motion to reconsider, the judgment that it entered in September 2004 made no reference to that order.[1] As a result, Hust's appellant's brief in the Ninth Circuit appropriately addressed the reasoning that the district court articulated in its March 2003 Opinion and Order, and it appropriately made no ref-

---

[1] The judgment stated that it also was "[b]ased on" the districts court's Findings of Fact and Conclusions of Law dated September 29, 2004. (Petition, App. 82). But the September 29, 2004 Findings of Fact and Conclusions of Law themselves incorporated the March 31, 2003 order, and made no reference to the order denying Hust's motion to reconsider. (*See* Petition, App. 78, September 29, 2004 Findings and Conclusions, stating that "[t]he court's factual findings are set out in detail in the court's Opinion and Order (#49)" dated March 31, 2003).

erence to the order denying Hust's motion to reconsider.

In Phillips' appellee's brief, he urged the Ninth Circuit to examine the district court order denying Hust's motion to reconsider. He argued that the order—by clarifying that Supreme Court rules required "*some* form of binding," and by declining to conclude that they required comb binding—somehow undermined Hust's appeal. But as Hust's reply brief in the Ninth Circuit accurately explained, whether the district court had concluded that Supreme Court rules required comb binding simply could not affect the basis for her appeal: "Defendant does not view the order on reconsideration as containing any material change." (Supp. App. 11, Reply Brief 5 n. 2). Although the district court "purported to abandon its earlier clear ruling that the Supreme Court's rules require comb binding, the district court ultimately stated that comb binding was the 'necessary alternative to stapling [Phillips'] petition," and it thus

> adhered to its [earlier] ruling that, under the circumstances of this case, [Hust]'s temporary refusal to comb-bind plaintiff's petition prevented plaintiff from filing a timely petition in compliance with the Supreme Court's rules. [Hust] fully addressed and refuted that notion in her opening brief.

(Supp. App. 12-13, Reply Brief 5 n. 2).

In Hust's view, Supreme Court rules permitted Phillips to submit an unbound petition, and refusal to let him use the prison comb binder could not have

prevented him from filing a timely certiorari petition or from otherwise exercising his right to access the courts. Whether the district court had concluded that comb binding was required, or whether it concluded only that *some* binding was required, Hust's legal position would remain the same: Under the circumstances presented, Hust could not have committed a constitutional violation by refusing to let Phillips use the prison comb binder.

In the end, both parties—while in the Ninth Circuit—expressly addressed the significance of the district court order denying Hust's motion to reconsider. More particularly, Hust's briefing in the Ninth Court accurately informed the court that the legal issues presented by the district court judgment were not somehow altered by the order denying her motion to reconsider. Any suggestion that Hust attempted to "deceive" or "dupe" the Ninth Circuit is at odds with the record.

D. The district court order denying Hust's motion to reconsider did not "destroy[] her case."

Phillips asserts that the district court's clarification on reconsideration "destroys [Hust's] case," and that Hust's "concerns raised in this Court as well as those raised in the 9th Circuit . . . were asked, answered, and disposed of" by the order denying the motion to reconsider. (Response 9, 1). For essentially the same reasons discussed already, Phillips is mistaken.

Whether the district court based its judgment on a conclusion that comb binding was required or, alter-

natively, on a conclusion that *some* form of binding was required, is immaterial. That is, regardless of the conclusion that the district court reached on that particular issue, the Ninth Circuit decision that Hust asks this court to review remains unchanged. The Ninth Circuit held that, although this Court's rules are "less than clear as to whether some form of binding [was] required in the circumstances presented in this case," Hust nonetheless violated Phillips' access-to-court rights by refusing to let him use the prison comb binder. (Petition, App. 16-17). The manner in which the district court resolved Hust's motion to reconsider does not somehow diminish the significance of the Ninth Circuit's holding, or somehow undermine Hust's argument that the Ninth Circuit committed legal error. Nothing about the order denying the motion to reconsider suggests a basis for denying Hust's certiorari petition, or for affirming the Ninth Circuit.

Phillips has identified no other basis—aside from the arguments discussed above—for denying Hust's certiorari petition, or for affirming the Ninth Circuit's decision. For the reasons that Hust recounted in her petition, the Ninth Circuit's decision warrants review and reversal.

CONCLUSION

This Court should grant the petition for certiorari and summarily reverse. Alternatively, the Court should grant the petition and set the case for briefing and argument.

Respectfully submitted,
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July 7, 2008

APPENDIX

No. 04-36021

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRANK MARVIN PHILLIPS, JR.,

Plaintiff-Appellee,

v.

LYNN HUST,

Defendant-Appellant.

APPELLANT'S BRIEF

Appeal from the United States District Court
for the District of Oregon

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B. On the undisputed facts, defendant did not violate plaintiff's right of access to the courts.

In *Lewis v. Casey*, 518 U.S. 343 (1996), the Court explained the constitutional right of access to the courts recognized in *Bounds v. Smith*, 430 U.S. 817 (1977). The *Lewis* Court explained that the constitutional purpose of the right of access to the courts is to ensure "a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts." 518 U.S. at 351 (quoting *Bounds*, 430 U.S. at 825). The *Lewis* Court held that to prove a denial of access to the courts, an inmate must prove that prison deficiencies

> hindered his efforts to pursue a legal claim. He might show, for example, that a complaint he prepared was dismissed for failure to satisfy some technical requirement which, because of deficiencies in the prison's legal assistance facilities, he could not have known. Or that he had suffered arguably actionable harm that he wished to bring before the courts, but was so stymied by inadequacies of the law library that he was unable even to file a complaint.

Lewis, 518 U.S. at 351.

The *Lewis* Court noted that certain statements in *Bounds* had suggested "that the State must enable the prisoner to *discover* grievances, and to *litigate effectively* once in court." *Lewis*, 518 U.S. at 354

(emphasis in original). In *Lewis*, the Court expressly disclaimed those suggestions. *Id.*

The *Lewis* Court also stressed the limited types of cases covered by the right of access to the courts. Direct appeals from criminal convictions are included (*Lewis*, 518 U.S. at 354), as are "'civil rights actions' — *i.e.*, actions under 42 U.S.C. § 1983 to vindicate 'basic constitutional rights.'" *Id.* (quoting *Bounds*, 418 U.S. at 579). The *Lewis* Court summarized:

> In other words, *Bounds* does not guarantee inmates the wherewithal to transform themselves into litigating engines capable of filing everything from shareholder derivative actions to slip-and-fall claims. The tools it requires to be provided are those that the inmates need in order to attack their sentences, directly or collaterally, and in order to challenge the conditions of their confinement. Impairment of any *other* litigating capacity is simply one of the incidental (and perfectly constitutional) consequences of conviction and incarceration.

Lewis, 518 U.S. at 355 (emphasis in original).

Finally, the *Lewis* Court identified what an inmate must prove to demonstrate a violation of the right of access to the courts:

> When any inmate * * * shows that an actionable claim of this nature [a challenge to sentences or to conditions of confinement] which he desired to bring has been lost or rejected, or that the presentation of such a claim is currently being prevented, because this

> capability of filing suit has not been provided, he demonstrates that the State has failed to furnish [the right of access to the courts].

Id. at 356.

In sum, under *Lewis* an inmate claiming a denial of the right of access to the courts must show actual injury. *Lewis*, 518 U.S. at 349. That requirement is not satisfied by a showing that the inmate was unable to litigate effectively once in court. *Id.* at 354. Rather, the inmate must show that an arguably actionable claim (that is, a nonfrivolous legal claim, *id.* at 353) challenging a sentence or conditions of confinement was lost or currently is being prevented because state prison officials have failed to provide the "capability of filing suit." *Id.* at 356

On the undisputed facts, it is clear that defendant did not prevent plaintiff from filing a nonfrivolous claim in the Supreme Court.

The district court's contrary ruling rests on the court's belief that the Supreme Court's rules require petitions for certiorari submitted *in forma pauperis* to be comb bound. *See* C.R. 49 at 29-30; E.R. 96-97. It was on that basis that the district court concluded that, in denying plaintiff's request for comb binding, defendant's

> actions caused him to face the difficult choice of violating a Supreme Court Rule by submitting a partially bound brief, or missing his deadline. Plaintiff chose to comply with the Supreme Court Rule, and missed the filing deadline; his petition was subsequently denied as untimely by

> the Supreme Court. Viewing the facts in a light most favorable to plaintiff, it appears from the factual allegations and from the record on summary judgment that defendant violated plaintiff's constitutional right to access the courts.

C.R. 49 at 30-31; E.R. 97-98 (citations omitted); *see* C.R. 49 at 32-33; E.R. 99-100 ("comb binding * * * was essential to plaintiff's filing"; "to deny * * * comb binding to an inmate plaintiff, so as to render him incapable of substantially complying with an applicable Supreme Court Rule").

A review of the controlling Supreme Court rules shows that the premise for the district court's ruling — that the Supreme Court's rules require comb binding — is simply wrong. Accordingly, there is no legal basis for the district court's decision.

Under Supreme Court Rule 39.1 and 39.2,[2] a person such as plaintiff seeking to proceed *in forma pauperis* for the purpose of filing a document must file a motion for leave to do so, together with the document. Rule 39.3 prescribes the form in which the document must be submitted:

> Except when these Rules expressly provide that a document shall be prepared as required by Rule 33.1, every document presented by a party proceeding under this Rule shall be prepared as required by Rule 33.2 *(unless such*

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[2] For the court's convenience, the Supreme Court rules cited in this brief are included in an addendum to this brief.

> *preparation is impossible).* Every document shall be legible. While making due allowance for any case presented under this Rule by a person appearing *pro se*, the Clerk will not file any document if it does not comply with the substance of these Rules or is jurisdictionally out of time.

(Emphasis added.) No rule expressly required plaintiff's petition for certiorari to "be prepared as required by Rule 33.1." Therefore, the petition had to be prepared in the form required by Rule 33.2 "unless such preparation [was] impossible." Rule 39.3. The rule expressly directs the Court Clerk to "mak[e] due allowance for any case presented under this Rule by a person appearing *pro se*." *Id.*

Rule 33.2(a) sets forth the relevant requirements, as follows:

> 2. *8 ½ - by 11-Inch Paper Format:* (a) The text of every document, including any appendix thereto, expressly permitted by these Rules to be presented to the Court on 8 ½ - by 11-inch paper shall appear double-spaced, on opaque, unglazed, white paper. The document shall be stapled or bound *at the upper left-hand corner.*
> * * *

(Emphasis added.)

The final quoted sentence from Rule 33.2(a) shows unambiguously that comb binding is not required. A document must be stapled or bound "at the upper left-hand corner." *Id.* That language does not permit, much less require, comb binding; comb binding results in a document bound along the entire left-hand

border rather than merely the "upper left-hand corner." Thus, a comb-bound document would violate Rule 33.2(a).

Further, the "impossibility" exception in Rule 39.3 completely excused plaintiff from the Rule 33.2(a) binding requirement. As plaintiff argued below and as the district court found, his petition was too thick to bind at the upper left-hand corner using a staple. Because the "preparation" required by Rule 33.2 was "impossible" (Rule 39.3), plaintiff was free to submit the petition to the Supreme Court unbound.

This point is bolstered by the portion of Rule 39.3 directing the Court Clerk to "mak[e] due allowance for any case presented under this Rule by a person appearing *pro se*." That provision shows clearly that the Court disregards technical and nonsubstantive imperfections — such as those involving binding — in documents timely submitted by *pro se* litigants.

Consequently, in denying plaintiff's request for comb binding, defendant did not prevent plaintiff from filing a petition for certiorari in compliance with the Court's rules. The untimely filing resulted from plaintiff's own error in believing that comb binding was required, and in waiting beyond the filing deadline before submitting his petition to the Court.

No. 04-36021

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRANK MARVIN PHILLIPS, JR.,

Plaintiff-Appellee,

v.

LYNN HUST,

Defendant-Appellant.

APPELLANT'S REPLY BRIEF

Appeal from the United States District Court
for the District of Oregon

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APPELLANT'S REPLY BRIEF

INTRODUCTION

Pursuant to Fed. R. App. P. 28(c), defendant-appellant submits this reply brief to address assertions in plaintiff's Brief of Appellee.[1]

I. Defendant did not violate plaintiff's right of access to the courts.

A. Under the facts presented, the Supreme Court's rules did not require plaintiff's petition for certiorari to be bound.

Plaintiff begins by arguing that the relevant Supreme Court rules required his brief to be bound in some fashion in order to be accepted. That argument simply ignores the dispositive provision of Supreme Court Rule 39.3. As explained in defendant's opening brief, briefs submitted to the Supreme Court *in forma pauperis* must comply with the requirements of Rule 33.2 — including the requirement of Rule 33.2(a) that documents be bound "at the upper left-hand corner" — "unless such preparation is impossible." The district court expressly found that plaintiff's petition was too thick to bind at the upper left-hand corner using a staple. C.R. 49 at 29; E.R. 96. Compliance

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[1] Plaintiff's repeated *ad hominem* assaults on defendant, her colleagues, and her counsel, which permeate his brief, are groundless, out of place in an appellate brief, and do not merit a response.

with Rule 33.2 thus was "impossible" in this instance. Accordingly, the Supreme Court rules expressly permitted plaintiff to file his brief unbound.

Plaintiff asserts that through this argument, defendant explains how a prisoner can "evade" Rule 33.2(a) or "be excused" from compliance with the rules. Br. of App. 7. To the contrary, defendant's explanation demonstrates how an unbound brief in these circumstances would have **complied** with the Supreme Court's rules.

In the same vein, plaintiff asserts that defendant suggests that the Oregon Department of Corrections (ODOC) "is not bound by any court rule." Br. of App. 7-8. To the contrary, ODOC acknowledges through its administrative rules and otherwise that it must provide inmates with the opportunity to file necessary documents in compliance with court rules. *See, e.g.*, Or. Admin. R. § 291-139-0005(3) (quoted at App. Br. 30 and ADD-8). Defendant's point is that, as already shown, plaintiff's filing of an unbound brief in these circumstances would have complied with the Supreme Court's rules.

Plaintiff also asserts that the question whether the Supreme Court rules permitted him to file an unbound brief "has no bearing" here. Br. of App. 7. To the contrary, the proper resolution of that question — that an unbound brief from petitioner in these circumstances would have complied with the Supreme Court rules — is absolutely dispositive of this case. Because plaintiff could have complied with the Supreme Court rules by filing his brief unbound, the temporary refusal to comb-bind his brief did not in-

terfere with plaintiff's ability to file that brief. Therefore, as a matter of law defendant did not violate plaintiff's right of access to the courts.

Next, plaintiff relies on the district court's ruling that access to comb binding was included among the "necessary supplies" that ODOC was required to provide to plaintiff to enable him to file his brief. Br. of App. 8 (quoting C.R. 49 at 32, E.R. 99) (in turn quoting Or. Admin. R. § 291-139-0005(3)). For the reasons explained in detail in defendant's opening brief at pages 17-19, that ruling rested on a clear misreading of Supreme Court Rules 33.2(a) and 39.3. As explained in that brief, Supreme Court Rule 33.2(a) does not even permit, much less require, any brief to be comb bound. Defendant relies on that argument here.

Plaintiff asserts that in its order on reconsideration (C.R. 60, Supp. E.R. 15-25), the district court later abandoned its earlier conclusion that comb binding was required. *See* E.R. 99-100 ("comb binding * * * was essential to plaintiff's filing"; "to deny * * * comb binding to an inmate plaintiff, so as to render him incapable of substantially complying with an applicable Supreme Court Rule"). Instead, the district court purported to recharacterize its ruling as stating only that "the plain language of the applicable U.S. Supreme Court rule requires some form of binding." Supp. E.R. 22. As explained above and in defendant's opening brief, however, that later proposition is refuted by the "impossibility" provision in Supreme Court Rule 39.3 and by the district court's finding that binding plaintiff's brief "at the upper left-hand

corner" (Supreme Court Rule 33.2(a)) — the only form of binding addressed by applicable rules — could not be done because a staple would not have been large enough to accomplish the task.

Plaintiff next relies on the district court's statement, in its order on reconsideration, that "comb binding was shown to be the necessary, available, and reasonable alternative." Br. of App. 10 (quoting Supp. E.R. 22). That argument, and the district court's statement concerning the "necess[ity]" of comb binding, ignore the point that, as pointed out at page 18 of defendant's opening brief, Supreme Court Rule 33.2(a) shows unambiguously that comb binding is not only not required, but not even allowed. The rule calls for binding "at the upper left-hand corner" unless it is "impossible" under Rule 39.3. Because comb binding results in a document bound along the entire left-hand border rather than merely the "upper left-hand corner," the rule does not allow comb binding.[2]

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[2] In his motion for sanctions, plaintiff criticizes defendant for not mentioning, in defendant's opening brief, the district court's order on reconsideration. Defendant does not view the order on reconsideration as containing any material change. In particular, although at one point the district court purported to abandon its earlier clear ruling that the Supreme Court's rules require comb binding, the district court ultimately stated that comb binding was the "necessary" alternative to stapling the petition. Supp. E.R.

Footnote continued...

(...continued)

22. Thus, the district court adhered to its ruling that, under the circumstances of this case, defendant's temporary refusal to comb-bind plaintiff's petition prevented plaintiff from filing a timely petition in compliance with the Supreme Court's rules. Defendant fully addressed and refuted that notion in her opening brief. There is no basis for sanctions here.